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Supreme Court of the United States.

OCTOBER TERM, 1890.

BERTHA HAMMOND, ET AL.
Appellants.

vs. } No. 383.

WILLIAM B. HOPKINS, ET AL.
Appellees.

Brief for Appellees.

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STATEMENT OF THE CASE.

The following abstract, we submit, represents the just and truthful statement of the important facts of this case, and which will be demonstrated to be true, by as an extended citation of the testimony of witnesses as is compatable with the brevity required by the Court.

Two brothers, John Hopkins and George W. Hopkins, were, in 1858, tenants in common of squares 94, 95, 96, 110 and 111 in Washington City, D. C. They were at that date and had been for some years previously engaged in the manufacture and sale of brick, on squares 95 and 96 and part of square 94.

On the 23d of November, 1858, John Hopkins made his last will, the material parts of which, after devising the residue of his property to his brother George W. Hopkins and his son John S. Hopkins, in trust to carry on the business of brick-making, are in the following words:

> "And upon further trust that, upon the arrival of my daughter Alice to the age of eighteen years, which will occur on or about the first of May, 1864, my estate of every kind shall be divided by my said trustees and executors among my children."

On the fourth day after making his will, viz. 27th Nov., 1858, John Hopkins died.

After this date the trustees continued to carry on brick making, and made a recorded subdivision of square 110 into fifty-two small lots, of which they sold at private sale all but sixteen. Immediately upon the arrival of the daughter Alice to the age of eighteen years the trustees advertised to sell the entire interest in all the above property which was then unsold.

This advertisement offered squares 95 and 96, containing about 4¼ acres, as a brick-yard, and square 111, containing about 2½ acres, as an entirety.

At that moment the issue of the late civil war was most doubtful, and Washington, being near the border line of the conflict and its real estate value dependent entirely on the perpetuity of the Union, the uncontradicted testimony shows that not only was the building business very much depressed, and consequently, no demand for bricks, but the condition of the real estate market so prostrated that undisputed witnesses declare it was no time to sell real estate. A material circumstance in this connection is the further clause in the will:

> "I believe the squares and lots of ground owned by my brother George and myself, is now and will continue to increase in value. I desire, if possible, that said land may be kept unsold and undivided until, as above stated, as it will thus be greatly to the advantage of my family; but as *circumstances now unforseen* may make a change necessary or desirable, I cheerfully trust in the prudence and discretion of my trustees, and I give them full power as above to exercise their judgment *as circumstances* may arise, making it proper to dispose of said

land and business, or to change and alter the same, believing they will have the comfort and welfare of my family and their relatives much at heart."

Notwithstanding this ample power to change the time of sale if circumstances unforeseen in 1858 should make it necessary or desirable, and the prophetic faith the testator had in the eventual value of the land, yet, on the 10th of May, 1864, the entire estate was offered at public auction.

At the date of the sale the children of the testator consisted of Mrs. Emeline V. Lilburn, a resident of St. Mary's County, Maryland, whose husband died in four months afterwards, leaving her with four infant children and an aged mother of nearly eighty years, and a large farm to manage, and which engrossed her entire attention

Mrs. Elizabeth A. Early, a widow at the time of the sale, and who boarded in the house of her uncle George W. Hopkins, trustee, without any means whatever except her share in the estate.

Mrs Mary Victor Wailes was, at time of the sale, unmarried, a young lady aged about twenty-four, and boarded also with her uncle George W. Hopkins, trustee.

Mrs. Alice C. Hall, then Hopkins, was a girl eighteen years of age, and boarded also with her uncle George W. Hopkins, trustee.

Isaac H. Hopkins, a young man of such dissipated habits as to be entirely incompetent to attend to business, and who died within three years after the sale.

George Washington Hopkins, a young man of confiding nature, with no business capacity, and who died 29th June, 1870, leaving two children, appellees, a son, William B. Hopkins, aged at his father's death eleven years, and a daughter, Anna B. Hopkins, an infant two years of age

William M. S. Hopkins, who, although in his youth, of good business capacity, was for several years before and at the time of the sale of grossly intemperate habits, and to such an extent that in two months after, namely, in the beginning of August, 1864, and continuing interruptedly until about 1870, he was confined three times in the U. S. Hospital for the Insane as a dipsomaniac, and who, in 1884, was, from their knowledge of him in said hospital, pronounced by Dr. W. W. Godding, superintendent of the same, and by Dr. Franklin, superintendent of the Bellevue Hospital for the Insane, New York, to be then and previously from 1864 to 1870, utterly incapable of enforcing his rights or attending to any business.

But previously to the sale of May 10th, 1864, this W. M. S. Hopkins, on 29th January, 1864, conveyed all his interest in his father's estate to Christopher Ingle, Esq., for the benefit of his wife, Sarah E. Hopkins. In consequence of his dissipation, Mrs. Sarah E. Hopkins, in 1867, went to Baltimore to reside, where she has lived ever since, and is still his wife, under all disabilities and protection of her coverture. Her evidence shows her to be a poor broken woman, who keeps a small boarding house. She is a party appellee, and not her husband, W. M. S. Hopkins.

John S. Hopkins, trustee, and brother to the above parties, completes the list of children of the testator.

The unanimous testimony of the witnesses of both appellants and appellees shows that all the children looked up to their uncle George W. Hopkins, trustee, as the head of the family, bestowing upon him the same reverence they accorded their father in his lifetime, and that the most implicit confidence was reposed in the integrity and wisdom of said George W. Hopkins and their father, John S. Hopkins, co-trustees, and that these five ladies, who constitute the appellees, with the exception of Wlliam S. Hopkins, the youth of eleven years in 1870, were women of only ordinary intelligence, but with no business experience whatever.

On the other hand, the evidence shows that while these trustees bore an excellent general reputation in the community for integrity and fair dealing, it also demonstrates that they were shrewd men of strong character, who were fond of money and would have all that was due them.

Before the arrival of the daughter Alice to the age of eighteen years, the trustees determined not to divide the estate, by partition, among the children, as they had the power to do, but to sell the entire interest and buy almost the whole bulk of it for themselves. This is conclusively shown by the testimony for the appellants. The latter contending that this information was communicated to the children with a promise "that they would give as much for it as any one else," the appellees each denying such knowledge. The fact, however, is indubitable that they were anxious to buy for themselves and not to divide the estate, because they did buy through a man named James Chapman, and this conclusion is corroborated by the fact that George W. Hopkins, half owner, was willing to expose his own interest to sale in order to become the owner of a larger interest, namely, the owner of the large square, 111.

In light of these facts and their subsequent subdividing of the property and sale in subdivisions, it is conclusive that they not only desired to become owners, but very greatly desired it.

Squares 95 and 96 were the first offered, having been advertised as a brick yard. Of all methods to reduce the price of this land the evidence shows none better could have been adopted. Not only was there no demand for bricks at that period, or for real estate in large quantities, but this property was utterly worthless as a brick yard. For more than nineteen years prior to the sale the property had been worked as a brick yard. There were but two kilns, much "cracked and crooked and very out of shape," the clay "was so sandy and poor" it could not be used, and the bricks condemned because "they mashed" when walked over. Besides the quantity of clay in 1864 was so small that they "gathered it from all quarters" they could, and they graded the streets for nothing for the clay on them. This was made a direct issue of fraud in the amended bill and there is no evidence in contradiction by the appellants.

Another issue made by the amended bill was that the sale of squares 95 and 96 as an entirety was a fraud designed to enable the trustees to buy at their own sale at less price than a sale by sub-division would have realized. This is demonstrated by the facts, that the trustees knew the value of sub-dividing the property into small lots, because as far back as the 16th Sept., 1859, when desirous as part owners of selling to the best advantage square 110, they sub-divided it into 52 small lots and sold by that sub-division continuously down to the very date of the sale; by the fact that squares 95 and 96 contained 187,422 square feet, or 4¼ acres, and which precluded every purchaser, except capitalists, (and capitalists were not in the real estate market in May, 1864;) by the fact that the entire evidence on both sides proves that for real estate to be sold at the best price it must be subdivided. Every witness on the subject of values for the appellants on cross-examination was compelled to admit this fact. Their denial, however, would have been valueless, because the Justices of the court know, as men of the world, that everywhere speculators buy from the ignorant or those in straightened circumstances and immediately subdivide and realize many times from one hundred to several thousand per cent. advance; by the fact that although square 95 was on the original plot of the city divided into six lots and square, 96 was divided into sixteen lots, these subdivisions were ignored, at their own purchase, but after these trustees became the owners, square 96 was subdivided into 58 lots, and sold by such subdivision, and square 95 was sold in lots according to the original subdivision, by the surest of all facts, that immediately after the sale of these two squares to James Chapman, the agent of these trustees, square 94, which was farther out than the others, and in the opinion of many witnesses worth less than the other two was exposed to sale before the same company in lots and at once responded in price by bringing from strangers an average of 12½ cents a square foot, whereas 95 and 96 was sacrificed to the trustees at 4 cents a square foot; that is, if squares 95 and 96 had brought their value as well as square 94 had brought its value, instead of the price being only $7,496.88 it would have been $23,427.75. This calculation is based on 95 and 96 being of no more value than 94, whereas in the opinion of many witnesses 94 was not worth as much as 95 and 96 by from 20 to 25 per cent. From the whole evidence it is clear that if these trustees had not been buying for themselves but selling their own interests to third parties they would have made those two squares have realized at least $30,000, instead of $7,946.88. There was no competition at the sale.

To excuse this great discrepancy of price between the sale of lots in square 94 and squares 95 and 96, the appellants set up two defences. 1st. That 96 had a number of holes in it, rendering its surface uneven and therefore unfit for subdivision; but this was answered by the cross-examination of the witnesses, who proved the existence of the holes, for they swore that the bottom of none of these clay holes was down to the grade, and in building there would be that much less earth to excavate, besides, there were but five of such places averaging twenty feet square and five feet deep, and it was shown by uncontradicted testimony that the cost of filling all these places would have been less than $115. 2d. That squares 95 and 96 were so much above grade as to be impracticable of subdivision. Some of their witnesses swore 96 was nearly forty feet above grade in some places. These statements were all corrected on the rebuttal by the production of the official grades by the surveyor of Washington, which proved that 95 was only one foot and a third above grade, and 96 less than five feet and a quarter above grade. The fallacy of both of these defenses are shown by the fact that although neither trustee spent a dollar in grading these squares, and although the Board of Public Works in 1872 lowered the grade of the streets surrounding these squares 4, 8, and 12 feet, yet, when acting for themselves, they subdivided these squares and sold them by such subdivisions.

The next property offered was square 111, containing 101,038 square feet, and sold as an entirety to the secret agent of the trustees at nine cents a square foot. For many years George W. Hopkins, one of the trustees, had resided on this square in a brick dwelling containing nine rooms. He wanted the whole of it for himself and consequently offered it so as to cut off men of moderate capital. Although he had just seen that square 94 had brought, by being sold as lots, more than three times as much as 95 and 96, he persisted in offering 111 as a whole. The evidence is conclusive and uncontradicted by any witness that 111 was the best of the five squares; that it was more valuable than 110, which was below grade and adjoined a burial ground, and that it was worth fifteen cents a square foot, is the opinion of the witnesses for the appellees. The purchase of square 111 by this trustee occasioned, therefore, a further loss of over $6,000. No defense is offered and no excuse is made for the sale of square 111 as a whole. The subsequent conduct of this trustee and his heirs renders any defense impossible, because this trustee being desirous of selling on the 6th August, 1868, with this square in the identical situation it was in when he purchased in bulk, he made a subdivision of part of the square into eighteen lots and sold accordingly, and again on November 8th, 1870, he subdivided another part into eight lots, and again on June 17th, 1878, his heirs subdivided another part into twenty lots, making the home residence a single lot No. 57, all of which have been sold accordingly to bona fide purchasers without notice.

Immediately after this sale they offered the unsold sixteen lots of square 110 to the public in *separate lots;* and, although these were below grade, in what was known as the "slashes" and adjoining a flourishing grave yard, they averaged 8 34-100 cents a square foot, within two-thirds of a cent as much as the improved and beautiful square 111.

There was no competition at this sale of square 111.

By these methods the property brought, at the lowest calculation, $22,092.85 less than it should, making a loss to the appellees of one-half, viz: $11,046.42.

We submit this is a certain and definite loss. If they had been selling in good faith these men would have made this property realize $40,000 more.

To rebut this case the appellants have produced a number of witnesses, speculators and friends, to show that other squares were bought in bulk at low prices; but, in every instance, without exception, each witness was compelled to admit on cross-examination that, although he bought in bulk at low figures, he subdivided and realized large and, in some cases, enormous advances.

The original and amended bills allege that these were frauds and were perpetrated secretly, and under such circumstances of confidence, inspired by the trustees, as to prevent these women from discovering them. To establish the concealment, by the trustees, of their purchase, it is proved and admitted that they employed one James Chapman to be their agent, through whom all their purchases were made. Chapman's name was announced at the sale as the purchaser; his name was recorded in the auctioneer's book of sales, and his name was published in the *Evening Star* newspaper. On the 20th of May, 1864, ten days after the sale, these men, as trustees and executors of John Hopkins, executed a deed to this Chapman, reciting a consideration of one dollar; but, on the same day, evidently contemporaneously, George W. Hopkins received a deed from him of the same property, having the false recital that Chapman had sold to George W. Hopkins square 111 for $9,093.44, and another deed to George W. Hopkins and John S. Hopkins, having the false recital that Chapman had sold to them squares 95 and 96, and parts of 94 and 110 for $10,840.24. A circumstance, pregnant with meaning, it is submitted, is, that these men did not record these deeds promptly, as bona fide purchasers do, but retained them in their possession until the 16th of November, 1864, within four days of six months, the period allowed by the law of the District of Columbia, in which to record deeds in fee, without losing their priority.

In a line with the forgoing deceptions, and as soon as the issue of the war made the perpetuity of the Union certain, and Washington real estate again of value, these trustees, in order to give a semblance of judicial sanction to their acts and further deceive appellees, went into the Orphans' Court, a tribunal of limited jurisdiction, confined exclusively to the settlement of accounts of personal property, and had an account stated by the Register of Wills, involving the settlement of the trusts of the will in the sale of the foregoing real estate, and by an ex parte proceeding, caused the court to pass upon their account, awarding to each child her share of the sum bid for the property as above set forth. That this Orphans' Court had no jurisdiction, and that the proceedings were *ex parte*, are clearly shown in the evidence.

By the acceptance of the money so awarded to the appellees and the fact that the appellees knew of the continuance of the trustees in the brick business, and that George W. Hopkins continued to reside on square 111, the appellants ask the court to believe that the appellees acquiesced in these sales, by which they were defrauded of one-half of their patrimony.

Every child of John Hopkins was subjected to the most rigorous cross-examination until this record has been swollen in consequence to over 1,200 pages. Every one of them swore that she was ignorant of the purchase of the property by the trustees, until informed by S. L. Phillips a few days before the institution of this suit; that it had been represented to them at the time of the sale that a bricklayer had bought it, and that subsequently their uncle and brother had bought of him; that it was represented to them by the trustees that the sale was *bona fide*, and that the property had brought all it was worth at the time, and that they had the utmost confidence in their said uncle George W. Hopkins, trustee. They were untarnished by the cross-examination. To disprove this most reasonable account of the transaction, and which agrees entirely with the great facts of the case, for it cannot be believed that these appellees agreed knowingly to a fraud by which they lost more than half of their little inheritance, the appellants called their relatives and friends as witnesses to show it was known by these female appellees that their uncle and brother were to be the purchasers. On cross-examination, however, every witness, with a single exception, admitted that she could not identify any one of the appellees as having received that information, but every one corroborated the appellees on the importance and material point that the trustees had inspired the appellees with the greatest confidence in their integrity and faithfulness.

Where there has been a long lapse of time in the enforcement of rights, no relief will be given, "except by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession." In addition to the concealments and subterfuges and frauds above narrated, it is more clearly proved than any other fact in the case, and that exclusively by the witnesses for the appellants—not one witness, but five of the relatives of the appellants, and that unanimously—that it was represented to these appellees by the trustees—not one of them, but both, George W. Hopkins and John S. Hopkins—that the property brought "its full price;" that it was represented "as a sale particularly conducted for the interest of the heirs;" that "no suspicion attached to the sale;" that these two men "were the head of the family," and that the appellees "had confidence in them that they would do what was right."

As to the last mentioned important and crucial facts there is no dispute or contradiction whatever, both sides agreeing upon them, and these facts, it is submitted, show an actual hindrance and impediment to the appellees in discovering their rights, caused by the fraudulent assertions of the trustees, that the property brought its full price and was particularly conducted for the interest of the heirs. When men make such statements, assuring the rectitude of their acts to those who have a right to believe in them, they cannot afterwards claim that those whom they have addressed in confidence were guilty of negligence in believing in their truthfulness. It must be shown that knowledge of their falsity has been brought home to such persons before laches can be imputed; and this proposition taken in connection with the fact that the appellees are women, unused to business, who had especial confidence in the trustees, their nearest relatives, and therefore believing in the truthfulness of such statements, is the whole point of this case.

Not only that, but the appellants have set up two inconsistent defences, and are yet maintaining them before this court, namely, the defence that no fraud existed in the sales or conduct of the trustees, and the inconsistent defence that the appellees should not have relied on that assertion of the trustees, but have discovered the fraud sooner; and because the appellees did rely on the representation of the trustees that no fraud existed, they are chargeable with negligence for not disbelieving them. We submit, that in the whole range of reported cases on this subject of laches, there is not to be found a single case—certainly there is none in the decisions of this Court—where the confidential relation of trusteeship and kindredship existed, and such trustees and kindred, informed those for whom they acted, that their administration of their trust was honest, and faithful, and on judicial investigation it was found to have been used to the injury of the *cestui que trust* and their own advancement that no laches, no negligence has been imputed, until those acts have been fully and clearly explained. Of all fraudulent concealment none is so powerful, none so perfect to accomplish its purposes, none so vicious as the direct and positive avowal under the confidential relations which exists between trustee and *cestui que trust*, between uncle and neices, between brother and sisters, that they have acted for the latter in an honorable and faithful manner. It is the direct *suggestio falsi.*

There are two other frauds, made issues by the amended bill, of such importance in throwing light on the conduct of the trustees that it is proper they should be stated. By the will of John Hopkins the trustees were given power of sale of the real estate before final division, when the appellee, Alice, should arrive at 18 years; but this power was coupled with the limitation that the proceeds of all such sales should be reinvested for the appellees. Under this power the trustees, before the sale of May 10th, 1864, sold 36 lots in square 110 at private sale, realizing about $3,741.70 from them, one-half of which was the property of the children of John Hopkins, and none of which was returned in their statement to the Orphans' Court or ever paid over to the appellees. The appellants seek to escape the force of this exposure by asserting (which assertion has no evidence to sustain it), that the proceeds of these lots were expended in maintaining those sons and daughters who lived in the house of George W. Hopkins. This assertion is made in the face of the words of their return in the Orphans' Court, in opposition of the express trust to reinvest and not spend, and the further fact that several of the *cestui que trust* did not live with George W. Hopkins.

The other fraud, last above alluded to, is known in the case as that of $3,523.04 in the Mix property. On his death bed John Hopkins sent for Charles E. Mix and asked him to redeem his promise to convey lots 3, 4, and 5 in square 67. Mix promised to do so. Mix kept his promise and conveyed the same by deed to "George W. Hopkins and John S. Hopkins as trustees and executors of the will of John Hopkins," "the said property to be held by them as trustees and executors for the purposes of said will." Notwithstanding this express trust and the fact that George W. Hopkins received this deed, with no mention of any interest in himself, and notwithstanding they sold it exclusively as trustees for the will, yet one-half of the proceeds was detained from the appellees. The defence offered for this violation of solemnly executed deeds is that John Hopkins and George W. Hopkins formerly took clay for their brickyard off these lots, and therefore it was partnership property.

To recapitulate, the amount these unfortunate beneficiaries were defrauded of by their trustees:

Under sale of squares 95 and 96............	$15,980.87
Under sale of square 111..................	6,000.00
Default in return of lots in square 110......	3,751.70
	$25,732.57
Half of above due appellees................	$12,866.28
Default on Mix property....................	3,523.04
	$16,389.32

The entire amount these trustees returned as the appellees' shares was $14,952.66, showing, if the allegations of their bills be true, they were defrauded out of more than one-half of their inheritance.

Another *suggestio falsi*, and pregnant, it is submitted, with meaning because illustrative of the fact that false in one, false in all, is the imperishable letter of John S. Hopkins, trustee, written in his own handwriting and produced by the appellants.

It is admitted in the case that W. M. S. Hopkins on July 7th 1860, conveyed to his brother John S. Hopkins all his share in his father's estate for the alleged consideration of $3,000. This deed, according to the allegations of the bill and admissions of the answer, was not a sale, but a trust "for the protection of his brother, the said Wm. M. S. Hopkins, who was addicted to gross intoxication, &c. On the 29th January, 1864, four months before the sale of May 10th, 1864, the said Wm. M. S. Hopkins conveyed the said interest to Christopher Ingle as trustee for his wife, Sarah E. Hopkins. In the mean-time the said Sarah was compelled to leave her husband and went to Baltimore to live.

In 1873, she wrote a letter produced by the appellants to said John S. Hopkins asking for payment from the sale of the lots, and sending him the number of the record of her deed. To this, on Aug. 27, 1873, John S. Hopkins made reply, (original letter produced by appellants,) "You ask me in your letter to make a payment on some lots that I have sold. I do not understand you. I have not sold any lots of yours, or any that you have any interest in, that I know of. And you ask me to go and look at the Records. I am very sorry that you did not come on, as it seems to me you have lost sight of the deed that you and William gave me, which I have, and it was duly recorded July 7th, 1860, in Liber J. A. S. No. 200 folios 138, 139, 140 and 141, one of the Land Records for Washington County, District of Columbia, which you can see at any time.

"Yours, Respectfully,

J. S. Hopkins."

"True copy of letter sent."

This deed is here set up against this woman as an absolute conveyance, although subsequent to the sale May 10th, 1864, a settlement was made with W. M. S. Hopkins for his share, the same as with the other children, and a receipt taken, and again on Dec. 2, 1873, another settlement was made with him by paying him $503.29, his distributive share in the six lots. As stated above it is admitted in the answer of the principal defendant to have been only a trust. This letter, his own words, not only constituted a fraud by alleging that the deed to Ingle for her benefit conveyed nothing, because of the previous absolute conveyance, but prevents the heirs of this man John S. Hopkins from claiming that this appellee Sarah E. Hopkins was guilty of negligence in taking his own declaration to be true.

Another important deception, and pregnant with concealment, is the fact, that although these trustees bought this property in 1864, yet, in every instance, when selling it, prior to the death of their two brothers, Isaac H. Hopkins and George Washington Hopkins, although the title was in them as individuals, they sold and conveyed as executors and trustees, the same as before their purchase, and it was not until after the death of George Washington Hopkins, the last male in interest, that they asserted their title recorded six years before, and sold and conveyed as individuals.

Thus it was that all these females were deceived into the belief that their estate had been properly administered and the trustees enjoyed in peace their possessions, subdividing the same and selling to *bona fide* purchasers.

In 1875 George W. Hopkins died. In 1877 his heirs and John S. Hopkins by decree of court caused a partition of the property to be made between them. The heirs of George W. Hopkins subdividing and selling by subdivision. John S. Hopkins built a row of six small two-story houses on some of the lots assigned to him, and paid for them by the sale of lots 1, 2, and 3, square 95 for $46,632.00. There is no competent or proper evidence that John S. Hopkins expended $25,000 to $30,000 on this property as alleged by the appellants. All he did expend was for this row of houses and taxes, and all expenditures are expressly provided by the decree to be reimbursed to his heirs on the statement of the account. So also with the heirs of George W. Hopkins. Nor is there any difficulty in stating such account. It can be proved what the houses cost, and taxes paid are all a matter of official record, and no possible damage can be done, and there is no fear of the court committing an error in seeking to correct one. But even if this was not so, a party who fraudulently acquires property cannot make it his by the expenditure of money on it.

On the 7th May, 1883, John S. Hopkins died. For years previous to the death of this trustee, his intemperate and incompetent brother Wm. M. S. Hopkins had been dunning him for money and a settlement, ignoring or forgetting the deed he had made to Ingle for the benefit of his wife. It is clear, from William's testimony, he had never considered he had been settled with, and that John had at times under threats of putting him in the "Poor-House," and at other times by promises that he would be provided for in his will, kept this imbecile quiet. On John dying without a will, making no provision for him, William, seeing no hope to recover what had been promised him, went to Mr. Christy, an attorney. After waiting on this gentleman several month, he drifted into the hands of Mr. J. J. Johnson, who, after a lapse of a considerable period brought the said William to Mr. S. L. Phillips, Mr. Phillips (see his testimony hereafter cited in extenso), undertook the investigation of his case, and found that he had made an apparently absolute conveyance of his interest in his father's estate to John S. Hopkins in 1860, and subsequently a conveyance of the same interest in 1864 to Ingle for his wife. This deed to John S. Hopkins was alleged by William not to have been a sale, but a trust, and in investigating whether it was a trust, and what the said trustee had done under their power of dividing the estate of old John Hopkins, all the frauds hereinbefore enumerated and proved in this case were discovered by said Phillips and communicated as set forth in his testimony to the appellees.

In his search after finding the deeds from William to John S. Hopkins, his brother, and the deed to Ingle, the said Phillips discovered that conveyances had been made by the trustees to one James Chapman, and by said Chapman to themselves as individuals. The said Phillips suspecting from these last deeds, being contemporaneous, hunted up the said Chapman, whom he found to be dead, but from his brother John Chapman, learned that James Chapman was not a *bona fide* purchaser, but the agent of the trustees at their own sale. The said Phillips searched the files of the Evening Star newspaper and learned who the auctioneer was, and discovered that said Chapman had bought the immense bulk of said property, at prices lower than any other purchaser.

The said Phillips then requested to be taken to the sisters of William, to enquire what they knew about the deed of William to John S. Hopkins being an actual sale. At this interview the said Phillips informed the appellees, sisters of William, of his investigations of the sales, and some of them demanded to know if the sales were void as to William, were they not so as to them alleging that this was the first time they knew of the above facts, it having always been represented to them that the sales were *bona fide* and fair. After several days consultation among themselves they met the said Phillips and employed him to bring this suit, which was instituted within about two weeks after his first interview with them.

A bill was filed, 8th April, 1884, setting up the sale to Chapman, as the secret agent of the trustees, to be a fraud, and praying for a proper sale and an account. All purchasers from either of the trustees or their heirs were expressly exempted from the application of the bill. To this bill answers were filed.

In the interval the counsel for the appellees continued their investigation into the facts of the case. Recovering the auctioneer's book of sales, it was discovered that 95 and 96 and 111 were sold as entireties, and that the clay on squares 95 and 96 had been exhausted. Also on further investigation it was ascertained that the pretended settlement in the Orphans' Court was without notice and ex-parte, and their account passed on the same day it was filed. These were the subjects of the first amendment to the original bill, filed July 8th, 1884. The counsel still continuing the investigation into the facts of the case discovered the appropriation, by George W. Hopkins, of one-half the proceeds of lots 3, 4 and 5, square No. 67, known as the Mix property, amended their bill a second time to cover that part of the case, and prayed the court to set aside the settlement of the Orphans' Court on the ground of fraud.

Thus this case grew in the discovery of the frauds. Evidence was taken at great length. The case was heard before Justice Merrick, who dismissed the bills with cost.

The appellees sued out an appeal to the general term; and where the three justices, Bingham, Hagner and James, after great deliberation, reversed the decree of the special term and awarded a decree in accordance with the prayers of the bills, namely: That the conveyances of said trustees to Chapman, and from Chapman to themselves were fraudulent and void, exempting, however, all sales by said trustees, or either of them, or their heirs, to bona fide purchasers from the operation of the decree; that the unsold property remaining in the defendant's possession should be vested in John J. Johnson, as trustee, to sell and divide according to the respective interests of the parties to the suit, and for that purpose the cause was referred to the auditor of the court to state accounts between all the parties. The said appellants to be allowed for all improvements and taxes, and expenditures, and the appellees to be charged with all moneys paid them.

Nothing could be fairer than the decree. Every right of the appellants was guarded, and the provisions of the decree were inevitable, if the sale of May 10th, 1864, was set aside.

Law of the Case.

Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused except by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor.

Lansdale vs. *Smith*, 106 U. S., 391.

Without reference to any statute of limitations the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case.

Harwood vs. *Railroad Company*, 17 Wall., 81.

The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alledged in his bill.

Badger vs. *Badger*, 2 Wall., 87.

It is a principle of law, as well as of natural justice, that greater consideration and care are due to persons known to be unable to take care of themselves, than to those who are fully able to do so. The driver of a team, seeing a child or a woman, or a person of known feeble intellect in the street, is bound to exercise greater care and diligence to avoid doing them harm, than would be obligatory if it was a grown and capable man. In dealing with a man whose rights, without his knowledge, but which, by due diligence, he might know, are passing away by lapse of time into another's hands, the latter may, perhaps, justify himself in the eye of the law (though not in conscience) in preserving a wary and crafty silence, so as to put his victim off his guard and bring him into his own power, whilst he would be perfectly inexcusable in taking advantage of a woman unskilled in business, and unused to stratagems, which are sometimes resorted to by unscrupulous persons. In view of this just standard of human action, which a court of equity always recognizes, the conduct of the defendant Graffam appears in a very unenviable light.

Graffam vs. *Burgess*, 117 U. S., 185.

Death of Trustees.

This being a suit by *cestuis que trust* against the heirs of their trustees for alledged fraudulent conduct of the latter in the matter of their trust, the death of said trustees is properly a subject of consideration by the court; not as depriving the appellees of their remedy for the recently discovered frauds, but as a matter of evidence in arriving at the exact truth. Some of the *cestuis que trust* are alive and able to speak. Both of the trustees are dead and unable to contradict them. This apparently gives the appellees some advantage over the appellants. In this particular case this advantage is only apparent to those who do not understand the facts of the case, and not real, because, in point of fact, the appellees, *cestuis que trust*, are all women and children, the only male being William B. Hopkins, lately of age and a child but five years old in 1864. All the appellants are even to-day ignorant of the merits of the case, as shown by their testimony, and did not one of them testify to a single fact of fraud by either of the dead trustees. Their testimony was simply negative, viz., that they did not know of the purchase by the trustees, and did not know of the frauds complained of in the bills.

The death of the trustees will be dwelt upon with great emphasis by the counsel for the defense, and as it is a point well taken under ordinary circumstances it will naturally be urged by the counsel beyond its legitimate application.

~~The counsel for the appellees, in view of this aspect of the case, expressly state and declare to the court that they do not rely upon the testimony of any interested party in this suit as to any fact of which said trustees, or either of them, were cognizant in their life time. The counsel for the appellees expressly declare, and ask the court to omit from its consideration, every fact sworn to by any interested *cestui que trust* or appellees, in relation to all transactions of which either of said trustees might testify to if they were alive and sworn in this case.~~

The counsel for the appellees hereby further declare that they rest this case on official documents, records, deeds, accounts of sales, books, and letters of said trustees, produced by the defendants themselves, and facts elicited on cross-examination of the defendants and their own witnesses' testimony, one and all, which could not be tampered with, and which, if said trustees were alive, they could not deny, and which, if they did deny, they would not be believed by the court.

The counsel for the appellees further declare that, for the purposes of the argument, they are willing to consider that the trustees were, each of them, alive, had been sworn in the case, and had expressly testified under under oath to every fact contained in the several answers of the appellants—not admitting, of course, the truth of said oaths, their testimony only to have credence, as the the great landmarks of this case, as the unimpeachable and irrefragable facts of the case will allow—such credence as their oaths would have if they were alive and before the court as witnesses.

The counsel for the appellees in this manner and by these admissions, neutralize to a minimum the injury to the appellants, resulting from the death of their ancestors.

This is a case of a purchase by trustees at their own sale, at public auction, of large numbers of city lots, put up and sold in large squares, and bought by said trustees through an agent—other property was sold at the same time to strangers; that bought by the strangers was sold in small lots, and brought, although adjoining that purchased as entireties by the trustees, threefold the price, in some instances. These are facts undeniably proved by the return of sales by the auctioneer—produced by the appellants as well as by the appellees. We hold the rule of law to be, that a purchase by trustees under such circumstances is void, and will be set aside on application of the parties injured, unless the appellees are bared by their own laches.

These facts, if said trustees were alive, could not be disproved by them; and the rule of law is independent of their existence.

In other words, in point of fact, the appellants, children of these trustees, are not injured, but benefited in their defence by the death of their fathers.

CHARACTER OF THE DEVISEES AND PLAINTIFFS ON MAY 10TH, 1864.

The family of John Hopkins consisted of four daughters and four sons, namely:

Mrs. Emeline V. Lilburn, a resident of St. Mary's County, Maryland, whose husband died September, 1864, and left her with four infant children and an aged mother of nearly 80 years, and a large farm to manage, and which engrossed her entire attention. It is proved in the evidence that during the war St. Mary's County was under military control, no one allowed to leave except by special order, and at all times communication is infrequent.

Mrs. Elizabeth A. Early was, at the time of the sale, a widow, and lived with her uncle George W. Hopkins, trustee, as one of his family, without any means whatever, and dependent incidentally upon him and John S. Hopkins, co-trustee, for her daily maintenance.

Mrs. Mary Victoria Wailes was, at the time of the sale, May 10th, 1864, unmarried, a young lady aged about 24 years, and lived with her uncle George W. Hopkins, trustee.

Mrs. Alice C. Hall, then Hopkins, was a girl 18 years of age, and lived under the roof of her uncle George W. Hopkins, trustee.

Isaac H. Hopkins, a dissipated young man, and who died soon after the sale of May 10th, 1864.

Jacob Hunaker, the brick-burner, for many years of old John Hopkins, testified, page 278, Plff's test.

Q. Did you know Ike Hopkins?
A. I did.
Q. At the time of the sale?
A. I did.
Q. What were his habits?
A. Well, sir, he was not doing anything but living home with the old man.
Q. What were his habits?
A. Why, drink very hard.

Mrs. Sarah E. Hopkins testified at page 367.

[Referring to the restaurant business of Wm. M. S. Hopkins.]

Q. Who was there with him?
A. His brother Isaac.
Q. What were his habits?
A. Dissipated.
Q. To what extent?
A. To a great extent; only not as noisy as Mr. William Hopkins when under the influence of liquor.

William M. S. Hopkins, the only surviving brother, testified as follows at page 142:

Q. Did your brother Ike drink?
A. Yes, sir; poor old creature; he was one of the best of them; that is what killed him.
Q. What were his habits in that respect when he died?
A. Whenever he could get it.
Q. He would do what?
A. He would drink.
Q. How long did he keep it up before his death?
A. Until he died.

Mrs. Elizabeth Early, at page 448:

Q. When did your brother Isaac die?
A. I do not remember the year.

Q. How long ago do you think?
A. He died during the war.
Q. What were his habits?
A. Not good; he was dissipated.

Mrs. Mary Victoria Wailes, at page 501:
Q. Do you know what were the habits of your brother Isaac?
A. Very dissipated.
Q. For how long had he been dissipated?
A. All his life, I believe.
Q. How long did they continue?
A. Until his death.

George Washington Hopkins, another son, and who died 29th of June, 1870, (page 520) leaving two children, plaintiffs; a son, William B. Hopkins, aged 11 years; and a daughter, Anna B. Hopkins, an infant, 2 years of age.

Stephen D. Castleman, referring to Levin and George Washington Hopkins, page 441.

A. Neither of them was a business man. They were not business men.

Q. How far, in your judgment, was either Levin Hopkins, or George Washington Hopkins competent to take care of and enforce his rights growing out of a complicated estate of inheritance against the fraud and designs of such men as John S. Hopkins and George W Hopkins, his uncle.

A. They were both confiding men. I want you to understand what I mean by that. In my opinion they were men who would confide utterly in their brother and uncle, low ability for business; and that would lead me to judge that they would be incompetent placed in such circumstances as those, etc.

David L. Shoemaker, page 80, formerly a miller in Georgetown, and now secretary and manager of the Seneca Quarries.

Q. Were you acquainted with Wash. Hopkins, George Washington Hopkins, the brother of John S. Hopkins?
A. Yes, sir; I was.
Q. How long had you known him?

A. I knew him ever since he was a boy and up to the time of his death. But I did not in later years know much of him; it was more as a boy that I knew him. After he left school and went to Washington I did not see much of him.

Q. Does your knowledge enable you to form any opinion as to his business capacity?

A. I do not suppose that Wash. Hopkins ever claimed to have any business capacity at all. He was not a business man. From all that I knew of Wash. Hopkins he was no business man.

Mrs. Elizabeth Early, page 448-9:

Q. Your brother, George W. Hopkins, when did he die?

A. I do not remember the year.

Q. What was his habits?

A. He was dissipated also.

Mrs. Mary Victoria Wailes, also a plaintiff and sister of George Washington Hopkins, gave evidence as follows, page 500:

Q. What were the habits of your brother, George Washington Hopkins?

A. He was dissipated, but not to the extent that William was.

Q. How long did those habits of George Washington continue?

A. I think until his death.

William M. S. Hopkins, the only surviving son of John Hopkins and a grossly intemperate man.

Stephen D. Castleman, page 42:

A. My knowledge of his business capacity, that I referred to in 1861 or 1862, was that he was incompetent to attend to business—either his own business or the business of anybody else.

Q. How far does that opinion continue down to the present time?

A. About the same.

* * * * * * *

Q. From your knowledge of Mr. Wm. M. S. Hopkins, how far was he competent in 1861 or 1862 down to the present time to enforce his rights of a complicated character in a law suit against a shrewd and designing man?

A. Utterly incompetent so far as his personal exertions would be concerned.

Theodore F. Browning, coffee merchant, page 54.

Q. How far did William M. S. Hopkins impress you, from your observation of him, as being capable of enforcing his rights to an estate of inheritance against such a man as John S. Hopkins?

A. I do not think he would be competent. He talked like a man who had his mind impaired by liquor—flighty.

W. S. Offutt, page 67, referring to W. M. S. Hopkins: "I do not think him capable of attending to business.

* * * * * * *

"I should not regard him as being capable of transacting any business at all."

Wm. S. Offutt, page 78, referring to Wm. M. S. Hopkins:

A. I have always regarded him as a man of very weak mind. As I stated before, I never regarded him as being capable of transacting any business at all. I would not have him transact any business for me.

Q. Does this opinion hold at the times when he is not under the immediate influence of liquor?—

A. Yes, sir; I do not think, even when he is not drinking—I do not regard him as being capable of attending to business.

Charles I. Smith, Government contractor and builder, page 83:

"I have looked upon him in the last fifteen or twenty yeas as being perfectly incompetent to take care of himself. I never saw much difference in him when he was under the influence of liquor or when he was sober. He seemed to be about the same thing."

Horatio Browning, grocery merchant, page 94, referring to Wm. M. S. Hopkins.

Q. What has been your observation of him since 1865 down to the present time?

A. He has been, as the boys say, "considerably off."

Q. What do you mean?

A. I mean that he has been—well, about half luny. He has not been the Hopkins of old by any means.

Q. From that period down to the present time what has been your estimate of his business capacity?

A. I do not think he had any of any consequence, &c.

James L. Barbour, grocery merchant, at page 102, referring to Wm. M. S. Hopkins:

Q. From your observation of him and knowledge in all these years how far, in your judgment, was he a man capable of attending to the ordinary business of life?

A. I do not think for the last 15 years; certainly, I would say from 12 to 15 years. I do not think he has been capable of attending to business—to any business of importance, &c.

Joseph B. Bryan, grocery merchant, page 98, known Hopkins since 1860:

Q. What has been his business capacity of late years?

A. None at all.

Q. How was he in point of mental vigor?

A. None at all; he was a perfect imbecile.

Dr. W. W. Godding, physician in charge of the U. S. Hospital for the Insane, at page 251, referring to Wm. M. S. Hopkins:

In 1864 "he was then an inmate of the Government Hospital for the Insane."

Admitted August 13, 1864; discharged September 2nd, same year.

Second admission 10th of January, 1865; Discharged 23rd of March, 1865.

Third admission September 19th, 1868; discharged August 6th, 1870.

Dipsomania. Struck on the head by a policeman, producing paralysis, and aphasia.

Made a recent examination of Hopkins, page 256.

A. I found a condition of mental enfeeblement that amounted, in my opinion, to a degree of imbecility that would make him incompetent to transact any business except the simplest kind. There was a want of distinct memory, an inability to express himself with clearness in regard to matters of general knowledge.

*   *   *   *   *

Page 258.

Q. How far is such a man as you have described, Mr. Hopkins, to be apt to be affected by the confidence in persons in whom he has a right to repose?

A. Such a man would be very much like a child—easily led, and it would not be a difficult matter to impose upon such a mind.

Dr. T. M. Franklin, Medical Superintendent of the New York City Lunatic Asylum, Blackwell's Island, and formerly assistant physician at the U. S. Government Hospital for the Insane in the District of Columbia while Wm. M. S. Hopkins was confined there between 1868 and 1870, at page 1252.

A. I considered him mentally umbalanced, impulsive, uncertain, trifling, incapable of continuous mental work, or of safely arranging his own business, or of providing or caring for himself without the guidance of a more reliable mind.

Q. As to his capacity to assert his rights or to contend against the will and fraud of a designing man.

"Not competent at all as against such will and fraud."

Sarah E. Hopkins. William M. S. Hopkins is, however, not a party to this suit, because, on the 29th January, 1864, before the sale complained of, he conveyed all his interest in his father's estate to Christopher Ingle, for the benefit of his wife, Sarah E. Hopkins. In consequence of his dissipation, Mrs. Sarah E. Hopkins, in 1867, went to Baltimore to reside, where she has lived ever since, and is still the wife of William, under all the disabilities of her coverture.

Such were the children of John Hopkins in 1864, at the time of the sale complained of. The uncontradicted and unanimous testimony of the witnesses for complainants and defendants is, that from the moment of the death of their father, John Hopkins, the entire family, and particularly the unmarried daughters, looked up to their uncle, George W. Hopkins, trustee, as the head of the family, bestowing upon him the same reverence, obedience, and confidence that they accorded their father in his lifetime, and were taught by him to consider themselves as part of his own family.

Stephen D. Castleman, page 43, referring to the female appellees:

Q. From your observation of the family, what relation or trust and confidence was reposed by these ladies in their uncle George W. Hopkins and John S. Hopkins, their brother?

A. I never knew anything to give me any impression that they did not have the utmost confidence in them. I looked upon those ladies as one who would confide in their brother, confide in their relatives, confide in any ordinary people, as confiding persons rather than the opposite.

Theodore F. Browning, page 54, referring to Mrs. Early, Wailes, and Hall:

Q. From your observation of them, how far had they the character of being confiding and trusting ladies?

A. I always thought they had a good deal of confidence in the uncle and brother.

Q. Which brother?

A. John.

Q. From your observation and knowledge of these ladies, how far, in your opinion, were they competent to discover fraud or enforce their rights in their father's estate, as against such men as their uncle George W. and John S. Hopkins?

A. When I knew them I do not think they ever thought much about any fraud or anything of that kind.

Q. Why?

A. They had all the confidence necessary in the uncle and the brother.

Mr. Granville N. Whittington, Clerk in General Land Office, page 59.

Q. From your knowledge and observation of these ladies what, in your judgement, was their qualification to transact the ordinary business of life, such as generally devolve upon men.

A. From my acquaintance of them and knowledge of the ladies—I speak particularly of Mrs. Hall, whom I have seen most, and with whom I have been most—she possessed very little of the qualifications of business which would enable her to transact the affairs of life as a man would.

* * * * * * *

Page 60, referring to her rights in this suit.

A. From my acquaintance with her I should consider her an unsophisticated woman, entirely incompetent to make any such investigation, or to investigate any affairs of that kind.

Q. Have you any knowledge of the extent of the confidence which Mrs. Hall placed in her uncle George W. Hopkins or John S. Hopkins, her brother?

A. Nothing more than came under my observation, seeing them as one united family, intimacy, confidence, and trust on all sides * * * I never saw a more united family."

Mrs. Hall, was married in 1867, and compelled to leave her husband in 1874, page 468, in consequence of his dissipated habits and want of moral character, page 501.

Mr. Anthony Hyde, confidential agent of W. W. Corcoran, referring to the two older daughters, Mrs. Lilburn and Mrs. Early, at page 306.

Q. Can you state, from your own knowledge of them, what capacity those ladies had at that time for business—to investigate their rights and understand them?

A. My association with them would not enable me to judge. They were ladies of ordinary intelligence, but never had anything to do with business that I know of—that is, during their father's life.

W. S. Offutt, clerk to L. J. Wailes, husband of one of the appellees, referring to John S. Hopkins, page 66.

A. I thought very highly of Mr. Hopkins. I had a very exalted opinion of Mr. Hopkins. He was, I thought, a good business man. I thought he was a very prudent, cautious man in business, reliable. I had the utmost confidence in him.

Mrs. Eliza Dashiels, witness for appellants, and mother of Esther E. Hopkins, and grandmother of Bertha Hammond, principal appellants, at page 813, cross-examination, referring to George W. Hopkins and John S. Hopkins, trustees.

Q. They were the head of the family, were they not, after the death of old John Hopkins, that is, George W. and John S. Hopkins, were the head of the family?

A. Yes, sir.

Q. They had the business management of the family?

A. Of course. It was left to them; there was no one else.

Q. The family looked up to them and their judgment?

A. Yes, sir.

Q. About all business transactions?

A. Yes, sir. There was no person else to look up to, in the way the business was left.

Q. What they stated about business matters was not disputed?

A. No, sir; because they had confidence in them that they would do what was right. He left it in his will that he had confidence in them.

We have thus shown by the uncontradicted testimony of the witnesses that the appellees are five ladies unused to business, one a married woman, and two children of George Washington Hopkins, one still a minor, and all of whom had the most implicit confidence in the integrity of the trustees, their uncle George W. Hopkins and their brother, John S. Hopkins.

CHARACTER OF GEORGE W. HOPKINS AND JOHN S. HOPKINS, TRUSTEE.

On the other hand, the evidence shows that these two trustees were shrewd men. Temperate in habits and attentive to business. Methodical and particular, clear-minded and silent.

Thomas J. Luttrell, an appellant and administrator of George W. Hopkins, page 853, testifies as to John S. Hopkins, on cross-examination:

Q. Was he a close-mouthed man?

A. Yes, sir.

Q. A very prudent man, was he not?

A. I think he was.

Q. Close.

A. Yes, sir; he was a pretty close man.

Q. Fond of money?

A. I suppose he was. Etc. [853.]

A. He was a pretty careful man?

Q. Kept his own secrets?

A. I think he did. He did not talk very much.

Q. You knew George W Hopkins?

A. Yes, sir.
Q. How long did you know him ?
A. Nine or ten years.
Q. He was a careful and good business man, was he not ? [854.]
A. Yes sir.
Q. A clear-minded man ?
A. I think so.

THOMAS W. MORGAN, witness for appellants, on cross-examination, on page 907 :

Q. Was not John S. Hopkins a very close man ?
A. Very.
Q. Fond of money ?
A. Yes, sir ; and he would have the last cent that you owed him.
Q. George W. Hopkins was rather lenient or easy ?
A. Yes, sir.
Q. John S. Hopkius was a man of strong character ?
A. Yes, sir.
Q. A strong man ?
A. Yes, sir.
Q. Had a good deal of force of character ?
A. A good deal.
Q. Determined to have his own way ?
A. He seemed to like to have his own way. I do not know about his being determined to have it.
Q. As far as he could ?
A. He was a very strong man, strongly made up, etc., * * * [907.]
Q. A strong characteristic of his disposition was love of money; was it not ?
A. That was one of them, yes, sir., etc.

S. F. FAGUE, page 64.

[Referring to the efforts of John S. Hopkins to get relief from the special assessments against his property.]

Q. From these various conversations which you had with him, and which were, as you say, of a business character, what conclusion did you reach as to his ability or capability of attending to business ?
A. I thought he exhibited a good deal of shrewdness in regard to the matter, and seemed to want to save every-

thing for himself that he could. He did not seem to want to pay anybody else for it. * * * He always looked to his own interests.

David L. Shoemaker, page 78:

Known John S. Hopkins for thirty or forty years; went to school together; were clerks in adjoining commission houses; met daily and had daily business transactions.

[Referring to John S. Hopkins, page 79:]

A. He was a fair business man. He was rather a shrewd man, a man who looked after his own interest, and held his tongue. I never knew a man in business in Water street in my life who told as little about his business as did John Hopkins. There was no one knew what he was doing half of the time, or any of the time. I never heard John Hopkins say that he was either making or losing money, never in my life; a closed-mouth fellow.

Page 81. "He looked out for himself; he was very close in his dealings, and pretty close every way."

Wm. H. Clagett, a prominent citizen, witness called by defendants, poge 925.

[Referring to John S. Hopkins.]

Q. He was a man of strong character?

A. Very strong and decided character.

Q Determined to have his own rights?

A. He never failed to stand up for himself under any circumstances when I met him.

Q. A man of strong will?

A. Very strong.

Q. Fond of money, was he not?

A. I think John kept all he could get hold of; he was anxious to hold on to his property, and contested the extravagant taxes and fought them up to the last minute.

Mrs. Esther E. Hopkins, the widow of John S. Hopkins, and a principal appellant, page 777.

Q. Was he not a very methodical man in his papers and accounts?

A. He was a very particular man about his papers and accounts.

Q. And left everything in good shape?

A. Yes, when he died.

Stephen D. Castleman, wood and lime merchant, referring to George W. Hopkins, trustee at page 43.

Q. Were you acquainted with George W. Hopkins?

A. Yes, sir.

Q. I mean George W. Hopkins, the brother of old John Hopkins?

A. Yes, sir; I knew him also.

Q. What was his capacity for business?

A. I always judged him to be a business man of capacity.

Q. How far does this capacity for business compare favorably with that of John S. Hopkins?

A. He compares equally.

Such were the *dramatis personæ* when these trustees perpetrated the frauds in the sales of the real estate on the 10th of May, 1864, by which they became, by a secret agent, the owners of almost the entire estate of John Hopkins, namely, the whole of squares 95, 96, 111, and part of squares 94 and 110, at one-third the price for which they would have consented to have sold their own interests therein to strangers.

On the one hand youth, ignorance, trust from kinship, confidence from the will of their father, female character and its weaknesses in the women, gross intemperance, with all its consequent evils and incapacities in the men; on the other hand, in the trustees' business capacity, apparent good character, assumption of authority over the complainants and their property, silent tongues, the love of money and strong and imperious characters and wills, which were determined to have their own way. A concatination of circumstances peculiarly favorable to the consummation of fraud, offering a rare temptation to the weakness of human nature which, it is so seldom able to resist.

SPECIAL KNOWLEDGE OF TRUSTEES OF THE VALUE OF THIS REAL ESTATE.

Under the will of John Hopkins, these two trustees were directed to carry on the business of brick-making, and from November, 1858, to May, 1864, they became intimately acquainted with the prospective value of squares Nos. 94, 95, 96, 110 and 111, which comprised the bulk of the estate. They walked over it every day and saw how high and salubriously it was located; that it lay at the intersection of three beautiful and important avenues, namely, Massachusetts, Connecticut and New Hampshire avenues, and that it was also intersected by P street, which then was the upper direct entrance to Georgetown.

That it was destined, if Washington had any future, to become the most valuable part of the city.

Not only were these things apparent to an unprompted judgment, but their minds were particularly instructed and directed to this state of things by the very will of John Hopkins. Thus he says in his last will, page 14:

"And as I believe the squares and lots of ground owned by my brother George and myself is now and will continue to increase in value, I desire, if possible, that said land may be kept unsold and undivided until as above stated, as it will be thus greatly to the advantage of my family," etc.

John F. Olmstead, a real estate broker of the most extensive knowledge, testifies at page 323, referring to John S. Hopkins and squares 95 and 96:

Q. What did you offer him for it?
A. Fifty cents a foot.
Q. When was that?
A. In 1872.
Q. What was the result of that offer?
A. He declined it.
Q. That related to what squares?
A. 95 and 96. * * * page 319.
Q. Was there anything from the close of the war in April, 1865, up to the time that this estimate was made, to make that property rise in value?

A. I do not think there was. I do not think that property got any impetus until the latter part of 1870 or 1871.

It was this knowledge of the future value of this most attractive and now fashionable part of Washington, which made these trustees desire to possess for themselves this property, and that at the lowest possible price. They accordingly seized upon the first moment they were allowed by the terms of the will to make a division of the estate, and offered, first of all, as an entirety, the valuable squares 95 and 96, containing about 4¼ acres, as a brick-yard.

THE SALE OF MAY 10TH, 1864.

The will of John Hopkins provided that when his youngest daughter, Alice C. Hopkins (now Hall), should attain the age of 18 years, and which would occur about the first of May, 1864, "my estate of every kind shall be divided by my said trustees and executors among my children," etc., page 14 :

"I believe the squares and lots of ground owned by my brother George and myself, is now and will continue to increase in value. I desire, if possible, that said land may be kept unsold and undivided until as above stated, as it will thus be greatly to the advantage of my family; but as circumstances now unforseen may make a change necessary and desirable, I cheerfully trust in the prudence and discretion of my trustees, and I give them full power as above to exercise their judgment as circumstances may arise, making it proper to dispose of said land and business, or to change and alter the same, believing they will have the comfort and welfare of my family and their relatives much at heart."

From this full and ample power vested in the trustees to sell in advance of the 18th year of his daughter Alice, if "unforeseen circumstances" might make a change necessary of desirable, and from the fact that he believed in the sure advance in value of this property, and did not wish it sacrificed,—that being plainly the controlling object of the will, it is apparent that such a testator would not have wished his property, for which he cared so much, exposed for sale in the midst of a great civil war, and where its value was entirely dependent upon the then doubtful issue of the strife. If such a testator, dying in 1858, could have foreseen the tremendous changes which took place in the next six years, he would have placed the strictest prohibition upon the sale at that time ; and if these trustees had come into a court of chancery, showing to that court the paramount wish of that testator that his property should not be exposed to sale under disadvantageous circumstances, and that a civil war was raging near its situs and its value vastly depressed in consequence, that court would have authorized them to forbear until the clouds of war had rolled by, on the ground that such was the evident intention of their testator.

NO TIME TO SELL.

Columbus Alexander, one of the largest estate owners in Washington, and a well-known citizen, testifies, at page 325.

Q. The year before the war closed, can you state, from your own knowledge, what was the condition of building at that time; say May, 1864; and also as to the activity in building?

A. My impression is that it was very much depressed about that time.

Q. What was the condition of the real estate market?

A. That was also depressed, according to my recollection.

No cross-examination.

Mr. Joseph Gawler, also a large real estate owner in the northwestern section of Washingtan, and who attended this sale, and was one of the purchasers of lots in square 110, testifies, at page 274.

Q. How was the building business at that period; a year before the war closed?

A. I think it was rather flat. I know material was rather high. Etc. 275.

Q. You say you went out there for the purpose, or because you supposed there might be a speculation in the purchase of ground? What is your judgment as to its then being a proper time to sell real estate in order to have gotten the best prices?

A. I would not have cared to sell any property at that time, if I had owned any.

No cross-examination.

Mr. Charles T. Smith, a large contractor of buildings, testifies, at page 88, Pltff's teet.:

Q. What was the condition of business in the city of Washington in May, 1864, the year before the war closed?

A. Well, it depends upon what kind of business you have reference to.

Q. Building?

A. It was prostrated then; nothing doing. I did considerable work then, but it was not for private individuals at all.

Notwithstanding this unpropitious time to expose real estate to public sale, these trustees seized the moment and offered the entire estate. If they had not intended to have bought, to have profited by this very depression of the market, does any one believe that these men, who were eager to grow rich, who loved money, would have allowed this sale to have proceeded, and their own shares in the estate to have been sacrificed? Their whole conduct in this case, which will be developed in these subsequent pages, gives the emphatic answer, they would not have sold for themselves, at such a period.

James Gawler, referring to auction sale of 95 and 95. Page 273.

Q. How many bids were there?

A. I think to the best of my knowledge and belief there was but one bid.

Q. Do you know for what price it was knocked down?

A. I think it was for about 4 cents a foot?

Jacob Hunaker, referring to auction sale of square 111. Page 377.

Q. I am referring to the sale of 111, how many bid on that?

A. 111?

Q. Yes, sir; where George Hopkins' house was—that square?

A. How many bids were made on it?

Q. Yes, sir.

A. I heard Chapman bid on it.

Q. Who else?

A. I cannot say who else.

Q. Do you know anyone else bidding on that property where George Hopkins resided?

A. I do not know. I really cannot say whether I heard anybody bid. I heard Chapman bid that is all I could say.

Employment of James Chapman to bid for trustees.

After these trustees had advertised all this property to be sold on the 10th May, 1864, it was necessary for them to make some arrangements by which they should be able to acquire the property for themselves without discovery.

They accordingly employed a man named James Chapman, a brick-layer, as their agent to bid on the property they wished to secure for themselves. This was charged in the bill in paragraph 10, and admitted in the answers, paragraph 10, page 28, and at page 33.

The same matter was proved, however, independently of the admissions of the answers of the defendants by John Chapman, the brother of James Chapman, the secret agent, at page 360.

It will be seen that the trustees did not let even this Chapman know their secret intentions to become the owners. Referring to information received from this agent, between the time of sale and making of the deeds, and therefore practically part of the *res gestae*, page 360, the brother testifies:

Q. Did he tell you at that time what was the purpose of the Hopkins in having him buy it for them?

(Question objected to by Mr. Davidge.)

A. He did not at that time.

Q. Did he subsequently?

(Question objected to by Mr. Davidge because of being a declaration.)

A. Yes, sir.

Q. When?

A. About, maybe, four or five days after the time I was speaking to him first on the subject. I could not state to a day now, because it was not a subject I did not expect to be called on to talk about now; but that is my recollection of it. I asked him what the object was and he could not positively tell me, so both of us came to the supposition that it was to perfect the title. That was only our impression.

Q. Did he make that statement to you?

(Objected to as leading.)

A. Yes, sir.

Q. How long were those conversations after the sale?

A. The first one was, to the best of my recollection, about two or three days after, and this was, we will say, about seven days after the sale took place.

SALE OF SQARES 95 AND 96, AS A BRICK YARD, A FRAUDULENT ABUSE OF POWER.

It was squares 95 and 96, which these trustees operated as a brick-yard, and to square 111, where George W. Hopkins, trustee, resided with his family, that the trustees were especially anxious to secure for themselves.

William S. Graham, a property owner who lived in the immediate neighborhood of this property for 60 years, testified, page 283:

Q. At that time, Mr. Graham, was there much clay on the premises?

A. Well, no, sir; there was not much after 1864. There was but very little, because Mr. Hopkins was gathering it from all quarters he could, and when the streets were opened he paid so much a yard. I believe sometimes he graded them for nothing for the clay on them.

Q. The public streets?

A. Yes, sir. Q street between 19th and 20th, I understand he graded that clay away for Mr. Roach, an Irishman was doing the work; graded it for the clay that that was on it.

Jacob Hunaker, brick-burner for John Hopkins for 19 years, page 276:

Originally there was 4 kilns at 20th and P streets. At the time of the sale there were only two and a little clamp. It was not stationary.

Q. How long were those two kilns there?

A. I worked there nineteen years, and they were old when I went there.

Q. What was their condition in 1864, at the time this property was sold at public auction?

A. Very old.

Q. In what?

A. Cracked and crooked and very out of shape.

Henry Birch, a street contractor and witness for defendants, page 694:

Q. Why do you suppose they got 4 cents a foot for it?

A. I suppose they were going to continue the brick-yard, as the kilns were all there, and bought them for the clay; if there were no brick, sheds, or kilns on there, I do not know that brick men would have cared to purchase it, as the clay had been all used up. * * *

Q. You say that the Commissioner of the ward objected to the use of the Hopkins' brick?

A. Yes, sir.

Q. Why?

A. He said that the clay was not strong enough; that the brick was too soft, and he wanted more sand in the brick. I used the brick, and walking over the pavement the brick mashed, and he said that they would not do in the pavement, and he said that if I used any more he would condemn the whole work.

It will appear by Jacob Hunaker's testimony, the brick burner for nineteen years, that at the time of the sale of the old kilns, which had previously existed on square 96, had been pulled down and the land "cleared up," and yet 96 was exposed an an entirety with 95, and both bought together as a brick yard, by the trustees, at four cents a square foot, without, practically, any competition. Page 280.

Q. When you first went there, there were how many kilns?

A. When I first went there to work there were four kilns—two on each side of P street. There were two up where John Hopkins built his houses and two on this side.

Q. How long were the four there? You said something about there being two.

A. We worked at the clay where John Hopkins is, and we tore the concerns down—the whole rigging—and moved to this side of P street, where Blaine's house is.

* * * page 276.

Q. How many brick-kilns were on that place?

A. When I first went there to work, there were four brick kilns.

Q. How many when the sale took place in 1884?

A. There were only two, and a little clamp. It was not up stationary.

To all this testimony and direct issue by the amended bill, showing the exhaustion of the clay on this property, and its utter unfitness to attract brickmakers to invest in it, there is not a syllable in contradiction by the defence. None knew the worthlessness of these two squares, 95 96, as a brickyard better than these two trustees,—one, George W. Hopkins, as half owner and partner of old

John Hopkins, had worked it for twenty years, and John S. Hopkins, the other trustee, had worked it for the previous six years. If it had been desired, therefore, to have depressed this property, to have made it sold for the least possible price, to have cut off all competition from the public at large as investors, to have offered it to a class who would not be bidders, no better plan could possibly have been selected than that pursued by these two men; and that, too, in the face of their trust contained in the will of their testator, when he declared that "I believe the squares and lots of ground owned by my brother George and myself is now and will continue to increase in value," etc.

It is therefore respectfully submitted that when the rule of law is, that a trustee shall not profit by his trust; that he shall not use his knowledge to his own advantage; that the *cestui que trust* is entitled to his best efforts; that the slightest taint of fraud, when shown to have been prompted for his own aggrandizement, will set aside his transaction in which he has reaped an advantage, and a sale of large and valuable property is made as a brick-yard, when it was totally unfit for such, but was valuable only as city lots to be improved or held as a speculation, and at which sale, the trustees became the secret purchasers, at one-third their then value, (as will be presently shown,) that that circumstance, single and alone, will constrain a court of equity to set aside such sale, and stamp the transaction as a fraud upon the rights of those they had promised to promote and to protect, provided always the party has not lost his right by his own negligence. There can be no question that if these sales had been recent they could not stand a monent. The appellees will show, farther on in this brief, that the case stands as if the sales had been made only two weeks before the filing of this bill.

SALE AND PURCHASE BY TRUSTEES OF SQUARES 95 AND 96 AS AN ENTIRETY.

As to the fact of how the property was offered, there is no contest, as it is proved both by appellees and appellants, and auctioneer's account of sales, pages 266, 267.

ENTRY.

Sq.	Lot.	Cont'g sq. ft.				
95 & 9	0	187,422	& imp., &c.,	0.4c.	James Chapman,	7,496.88
94	1	9,599	imp.,	10	do	959.90
94	6	8,100		13	August Miller,	1,053.00
94	2	8,918		10½	do	936.39
94	3	7,341		10½	do	770.85
94	4	5,753		10½	do	604.00
94	5	6,943		14	do	972.02

THOMAL J. FISHER, Auctioneer.

Q. In making sales of real estate, from whom was it usual for the auctioneer to take their orders as to the manner in which the property should be put up and exposed for sale?

A. We always took our orders from the trustees, executors, or owners, as the case might be.

From this account of sales and testimony it is apparent that these two squares were ordered to be sold together, and offered, first of all, by the express directions of these two trustees.

By this same account of sales it appears that these two squares contained 187,422 square feet, or about 4½ acres of land, within the limits of Massachusetts avenue and O street, on the north and south sides, and 20th and 21st streets, on the east and west sides, was sold in bulk to James Chapman for the sum of 4 cents a square foot.

INADEQUACY OF THE PRICE FOR SQUARES 95 AND 96.

On a most casual examination of this account of sales, the eye is at once struck with the discrepancy of the price of 4 cents for squares 95 and 96, and 13 cents, and 10½ cents, and 14 cents respectively for the lots in square 94, which were bought by August Miller, a stranger to these trustees. And this astonishment is increased when the reader knows that square 94 immediately adjoins square 95 on the north, is nearer to Boundary street, farther removed from the center of the city, and had nothing about it to render it any more valuable than the other two squares, which sold for one-third the price.—Exh. R. S. B., No. 13, page 1264.

Mr. Joseph Gawler, a purchaser at the sale of lots in square 110, and a large owner of real estate in the northwestern section of Washington, testified, page 274;

Q. What was, in your judgement, the comparative value at that time (time of sale) between square 94, where Mr. Miller bought and squares 95 and 96, where the brick-kilns stood?

A. Well, 95. I should say, would be worth—I do not know, but may be a cent or so more. It was a little nearer the city. Etc. [455]

Q. How about the 96 as compared with 94?

A. I suppose that would be worth a litle more also; I suppose a cent or so in the foot, etc.

Mr. Anthony Hyde, page 304, confidential agent of W. W. Corcoran for 36 years. Duties to know the value of real estate in the northwestern section of the city of Washington, where Mr. Corcoran owned a vast deal of real estate.

Acquainted with squares 94, 95, and 96 in 1864. My general observation obtained by passing by them almost every day. Mr. Corcoran owned property very close by.

Q. From your observation of that property, which of those squares, in your judgment, was the most valuable at that time?

A. I should say the squares nearer to P street. The nearer you come to the heart of the city, the more valuable the ground would be. * * * Etc. Page 304.

Q. The question is whether 94, which is the north square, was, in your judgment, as valuable—the two more southern squares.

A. At that time?

Q. Yes, sir; at that time.

A. Before I answer that I would like to ask whether there are any improvement on them.

Q. No, sir; all vacant.

A. All vacant?

Q. The bricks were upon them.

A. I do not know. I think the difference in value would be about 30 per cent.

Q. In favor of which squares?

A. In favor of the lower squares.

Charles T. Smith, builder and general contractor, page 85. (Referring to 94, as compared to 95 and 96):

A. I should not think so. It would not be worth as much to me. I would not have given as much had I been buying it.

Q. How much less, in your judgment?

A. I should not think it was worth—I would not give as much as 25 per cent. less as I would for the square the other side of it.

Thomas E. Waggaman, page 308–309, a very extensive real estate broker, who became acquainted with this property in probably 1866:

Q. Mr. Waggaman, please state, if you can, at your earliest remembrance of this property, what was the comparative value of squares 94, 95, and 96?

Well, in my best judgmant, the squares at about that time were of equal value.

William S. Graham, page 282:

[Resides on part of square 94, which he owns; lived in the neighborhood of this property for 62 years.]

Q. What was the value of squares 95 and 96 at that time in comparison to square 94?

A. Well, to the best of my knowledge, I think squares 95 and 94 were worth in the neighborhood of 14 cents a foot.

Q. And what was 96 worth at that time, etc.?

A. About the same.

Q. About the same?

A. Yes, sir; two good squares.

Columbus Alexander, page 325:

[Old resident of Washington, owner of large amount of real estate and of adjoining square.]

Q. You are the owner of a large amount now (real estate) are you not?

A. Yes, sir.

Q. I will ask you to state if you were acquainted with squares 95 and 96, the squares on one of which Mr. Blaine's residence is situated, and the one south of it in, 1864?

A. Yes, sir.

Q. Please state what, in your judgment, were the values of squares 95 and 96 in 1864?

A. Some lots were worth more than others. I should say it was worth from 10 to 12 cents a foot.

Q. All around?

A. Yes, sir; some would be 10 and some would be 12. That is my best judgment.

Q. That would make a general average of those squares 10 to 12 cents?

A. Yes, sir.

It thus appears that, on the the same day, at the same hour, before the same company of bidders, that square 94, immediately contiguous to squares 95 and 96, lying farther from the center of the city, on the same plateau of land, and general elevation, and in the opinion of witnesses, less valuable than either 95 and 96, (to which opinion there is not one syllable of evidence offered by the defence in contradiction) was sold to strangers for an average of 12½ cents a square foot, while these two squares were knocked down to the agent of the trustees for 4 cents a square foot. In other words, if squares 95 and 96 had brought their value as well as square 94 had brought its value, instead of these complainants receiving for the two squares only $7,496.88 they should have received $23,427.75, making a loss to them of one half of $15,930.87, and a gain to these trustees by their fraudulent purchase of a corresponding amount.

SQUARE 95 AND 96 SHOULD HAVE BEEN SOLD IN LOTS.

The question arises at once before the mind, how did this gross discrepancy of price come about when this property of equal value was both exposed to public competition? The answer of the witnesses, both for complainants and defendants is, that the squares should have been sold in lots as square 94 was, and thus competition invited instead of repressed.

It will be seen by exhibits R. S. B., 18 and 19, that the original projectors of Washington City designed that squares 95 and 96 should both be sold in separate lots. Square 95 was on the original plot divided into six lots, and square 96 was divided into sixteen lots. These trustees ignored these subdivisions, and sold them as an entirety. Square 94, which is an exact counterpart of square 95, and which they wished to sell and not to buy, where their part ownership in the proceeds, their selfishness urged them to obtain the highest price, they sold in separate lots at an average price of 12½ cents per square foot. By the uncontradicted testimony of

Messrs. Gawler, Smith, Hyde, Graham and Alexander, 95 and 96 were more valuable than 94, and yet the trustees bought 95 and 96 as an entirety at 4 cents per foot, and sold in separate lots 94 at an average of 12½ cents per foot, before the same company and on the same occasion.

Railroad Co. vs. *Durant*, 95 U. S., 579.

"The office of trustee is important to the community at large, and frequently most so to those least able to take care of themselves. It is one of confidence. The law regards the incumbent with jealous scrutiny, and frowns sternly at the slightest attempt to pervert his powers and duties for his own benefit."

Mr. Columbus Alexander, at page 325:

Q. You have attended a large number of sales?

A. Yes, sir; I have attended a great many sales.

Q. Bought a great deal of property and sold a great deal?

A. I have bought some property.

Q. Please state what, in your judgment, is the most advantageous manner, to the seller, to sell property, whether in bulk, in squares or by subdivision?

A. Most unquestionably to sell it by subdivisions is the most judicious way. I have some experience on that point, because I recollect I bought some in a lump once and had to give it up, or rather the court decided that it was not a fair way to sell the property, and set the sale aside—a trustee's sale.

Joseph Gawler, at page 274:

Q. From your knowledge of sales of real estate, how should squares 95 and 96, which were sold together, have been sold in order to have brought the highest price?

A. I suppose if they had been subdivided in small lots they would have brought more.

William S. Graham, at page 286:

Q. Which would have been the more preferable way to have sold squares 95 and 96, by squares or by lots, in order to have made them obtain the highest price?

A. Well, I should think, by lots.

Thomas E. Waggaman, at page 391:

Q. I understand you to say that you have had large experience in the sale of real estate?

A. I have.

Q. State which is the most advantageous way to sell city property, whether by squares or lots, in order to obtain the best possible prices?

A. It brings the best price in lots.

ATTEMPTED DEFENCE OF SALE OF SQUARES 95 AND 96 AS AN ENTIRETY.

Not a witness was examined by the defence to show that these squares were proper to have been sold as brick-yards; not a syllable was offered to prove the evidence of the plaintiffs regarding the inferior character of of the remaining clay on the premises was untrue ; not a sentence was introduced in defence that the clay was not exhausted, but a great deal of testimony was brought forward by the defendants to show that squares 95 and 96 were so very much above grade as to be not susceptible of sale in lots, that they were also so full of holes and pits, made by the digging for clay, and that the property was so uneven and rugged as to have rendered it improper to have offered it to the public except as it was sold. This is the entire defence offered for this great sacrifice of property, and let us pause to examine what their own witnesses have said.

Dr. A. P. Fardon, the first and leading witness for the defence on this subject, testifies as follows, at page 723:

[Referring to the holes in square 96.]

Q. How large were they?

A. I could not say exactly how large they were.

Q. 20 feet square?

A. I presume some of them were as large as that.

Q. Were any larger than 20 feet square, in your judgment?

A. I could not say. I could not say how much more; I never examined them particularly. * * * I could not answer that as to how many holes there were.

The bottom of none of those holes were down to the grade; the surface was uneven. In some places where it was dug out so that it formed an excavation or bowl, as you may be pleased to call it, rain water would stand, and in other places there would be quite a high bank where it was not excavated, and in digging out the clay the surface was very uneven and broken. * * * [713]

Referring to the number of holes. [713]

A. I presume there was five places there where the dirt had been excavated; perhaps as many as that; perhaps more where, averaging the squares, they might be called holes; but, as I stated in the beginning, the bottom of none of the holes was actually down to what was the grade of the street. * * * 714.

Q. How large were they, as a rule, or on an average?

A. I should judge—they had the appearance, when I saw them, of being places where they had conveniently thrown out clay into the carts, and perhaps averaged fifteen or twenty or twenty-five feet square ^where they had dug out good clay.

Mr. G. T. Raub, the brother-in-law of one of the trustees, and a witness for the defence, when interrogated as to these holes in square 96 testified, on cross-examination, page 687.

Q. How deep were these ponds?

A. I should think that some of these were from 4 to 5 or 6 feet deep, and may be more.

The defense, however utterly failed to prove any unevenness or holes in squares 95, where the brickyards and kilns stood.

This same witness, Mr. Raub, the uncle by marriage of many of the defendants, and who pretended to have been over the property very often answereed: page 687.

Q. Were there there any holes on the brick-kiln square (95)?

A. I do not think there were; I do not recollect

At page 1112 rebuttal testimony, Mr. William Fletcher proves that the cost of moving earth and filling holes about that time, even if done by horse and cart, was only 12 cents per cubic yard. Thomas Steep, witness for defence, puts the highest price at 20 cents, page 743.

Now, 5 holes 25 feet square, and 5 feet deep, contain only 579 cubic yards, at 12 cents per cubic yard, costs only $69.36, at even 20 cents per cubic yard costs only $115.60.

So, that it is demonstrable from their own case; when their witnesses are probed so that the court may know what they mean by saying that the squares were filled with holes and was uneven, and therefore not susceptible to sale in lots, we find that these trustees might have filled every hole, as it was their duty to have done, and presented an even surface for the paltry sum of one hundred dollars.

But the holes in reality never affected the value of this land one dollar, as is abundantly shown, first. by the witnesses for the complainants, and secondly, and unanswerably, by the fact that these two trustees, after they became the owners of these squares, they subdivided them themselves, and sold them, even in their small subdivision lots of 25 feet front, to purchasers who graded after they bought.

John F. Olmstead, p. 319.

Q. Did these holes that were in 96 impair the value of that square?

A. No, sir; I do not know that they did. At that time the grade established was very different from what it is at present, and those holes were not, I should think, over six or seven or eight feet deep.

Q. Holes that clay had been dug out of?

A. I know it was my idea about that; that that being the crest of the hill, the water could be easily drained off of it, and in case of the property coming into the market why the holes would simply save digging for cellars.

The surface of square 95 was proved by the measurements of Mr. Kerr to be the same at that very date as when the brick kilns stood there, by the fact that seven of the original drains are still visible, each averaging over 100 feet in length. (1119, 1120.)

The surface of square 96 was also proved to be the same at the time of taking testimony as it was in 1864, by the undisputed measurements of Mr. Kerr (pp. 1117, 1118) and by the testimony of Mr. Fardon, witness for defence, that the trustees never did any grading, of any consequence. (p. 632.)

UNEVENNESS OF SURFACE OF SQUARES 95 AND 96 A FALSE DEFENSE TO THE DUTY OF SALE IN LOTS, BECAUSE THESE TRUSTEES SOLD THE SAME SQUARES IN SUB-DIVISION LOTS FOR THEMSELVES.

The crowning, the unanswerable argument to this attempted defense, that it was not proper to offer for sale squares 95 and 96 in the lots in which they were originally divided, is that when these two men came to be the owners themselves of these two squares that, without their surface being altered, they subdivided square No. 96 from its original 16 lots in 58 sub-division lots, and sold 95 by its *original* 6 lots.

SQUARE 96 SOLD WITH SQUARE 95 AS AN ENTIRETY, SUB-DIVIDED IN 58 LOTS.

Sub-divided Oct. 20, 1877, by John S. Hopkins and the children of George W. Hopkins. Originally contained 16 lots. Average width of lots, 20 feet wide by 90 feet deep. Exhibit R. T. B., No. 20.

If these trustees could sell for themselves these two squares, not only in the original lots, but even in smaller sub-division lots, making each original lot three lots for themselves, why, we ask in the name of justice, why, in the name of the sacred trust committed to them by their dying kinsman, to be administered for their incompetent kindred, could they not have likewise sold in sub-divisions. The evidence in this case does not allow them to plead ignorance of the value of sub-divisions in enhancing the price of property. For when they were acting for themselves, even as far back as the 16th of September, 1859, when desirous of selling 110, they took this square of 16 original lots and sub-divided in 52 lots and sold them accordingly. Exhibits R. S. B., 14 and 15.

DEFENCE, THAT SQUARES 95 AND 96 WERE SO HIGH ABOVE GRADE AS NOT TO BE SUSCEPTIBLE OF SALE IN LOTS.

The last and only other defence offered for the conduct of these trustees in selling these squares as a whole, is that they were so high above grade that it was not good judgment to offer them in lots.

Dr. Fardon, the appellants' chief witness, was compelled on cross-examination to admit, referring to 1866, "I do not know what the grade was."

But this whole defense was absolutely and crushingly rebutted by the appellees when they produced and proved the original and official grade of these squares by official documents in the possession of the Surveyor of Washington.

Mr. William Forsyth, Surveyor of Washington, proved the following to be the official grades of these squares in 1864 (pages 1037–1038):

RECAPITULATION.

SQUARE 95.

	Feet.
Northwest corner of sq. 95, cut	6.71
Southwest corner of sq.. 95, cut	2.93
	2)9.64
Average cut	4.82
Northeast corner of sq. 95, fill	2.04
Sourtheast corner of sq. 95, fill	.59
	2)2.63
Average fill	1.32
Average cut	4.82
Average fill	1.32
	2)3.50
Average grade	1.75

SQUARE 96.

Northwest corner, cut	4.59
Northeast " "	.10
Southeast " "	7.89
Southwest " "	8.53
	4)21.11
Average grade of square	5.22

It thus appears that on the 10th of May, 1864, the average grade of square 95, as compared with its surrounding streets, was only 1 foot nine inches above these streets, and that square, 96 was only 5 feet 3½ inches above its streets.

FRAUD AND GUILTINESS OF TRUSTEES SHOWN IN THEIR SUBSEQUENT SALE OF THESE SQUARES.

There was one measure for the *cestuis que trust*, and another measure the trustees adopted for themselves. The surface of the ground was too uneven for these lots to be sold separately; the grade was too high for purchasers to be induced to bid, therefore, per force, without ever trying that course, they must offer these squares together. And yet after they secured the title to themselves, how different their conduct. The surface of these squares remained the same, as sworn to by the witnesses; the grades of the streets were actually lowered by the Board of Public Works in 1872, (exhibit at p. 1054), 8, 10 and 11 feet, and yet these men, then truly anxious to obtain the highest price, sub-divided square 96 from 16 into 58 lots, and sold them to separate purchasers, who, after their purchase, graded them to suit themselves. Square 95 they sold also in the original lots.

This fact we submit is absolutely unanswerable, and disposes of the entire defence. These *cestuis que trust* had a right to have these trustees act as well and prudently for them as they did for themselves. This is the law of trusts, and when we find them buying in lump, and as a brick-yard, and then resorting to subdivisions and selling in the smallest portions possible, buying when the average grade was 5 feet, and selling when the average was 12 or 13 feet, no candid mind, no judicial officer, will fail to say that this fact alone stamps the transaction as fraudulent and void.

See, if the court please, what these men have done with this property, and the enormous sum they have made it yield when dealing for themselves:

Lots.	Square.	Price.
14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28	111	$4,000 00
29 and 30	111	894 36
40	111	1,385 00
4	96	1,356 80
3, 29, 30, 31	96	1,340 00
56	111	1,435 32
55	111	1,442 67
58	111	1,386 00
59	111	1,288 20
32, 33, 34, 35, 36, 37, 38, 39	111	1,191 00 1,093 00 1,904 00 5,136 90
54	111	937 50
13	94	2,500 00
16, 17	94	3,400 00
45, 46	96	3,350 00
48, 49, 50	96	4,050 00
41, 42, 43, 44	96	4,250 00
1, 2, 3	95	46,632 00
51, 52, 53	96	3,500 00
1, 57, 58	96	4,700 00
47	111	1,176 00
56	96	1,350 00
47	96	2,250 00
2, 3 29, 30, 31, 32, 53, 34, 35, 36, 37, 38.	96	9,045 00
48, 49	111	3,034 00
50, 51	111	3,622 00
45, 46	111	4,045 00
43, 44	96	4,215 00
55, 55	96	6,660 00
5	95	3,625 00
		$136,147 75

One hundred and thirty-six thousand dollars, when operating for themselves—money actually received—besides over one hundred and twenty-five thousand dollars for property, yet unsold, and held by these appellants, as heirs of these trustees.

It is true that the prices of real estate have gone up to high figures in the neighborhood of this property, and these sums are not brought forward to show these men in 1864 should have sold this property for the above sum; but they are brought forward to prove, and, it is submitted do prove, that the defence, that these squares could not have been sold advantageously as lots is utrue in point of fact, as these trustees, and the present defendants after them have sold them not only in the original lots, but also in subdivision lots.

WITNESSES FOR DEFENCE ADMIT THAT SQUARES 95 AND 96, ON 20TH STREET, WERE SUSCEPTIBLE OF SUBDIVISION.

Dr. Fardon, who seems to have been the witness the appellants most relied upon, who was the first examined, and at great length, testified as follows, page 625.

WITNESS. I stated, as to square 95, that a person could purchase lots there, and the grade was such that it would take very little to build houses on a portion of the square. [Square 96.]

Q. We will confine ourselves to that, the front of square 96, between O and P, where Judge Drake's residence is at present. I will ask you to state whether the grade there was such as to materially affect the value of that land?

A. Not particularly on the 20th street front of it. It did not affect it to a very great extent, but it did some.

It thus appears that all along 20th street, which was the only street then opened out to boundary, and was the principal thoroughfare to the county of Washington between 14th street and Georgetown, and on which street the lots at that day would be the most valuable, that the lots on this street were nearly on grade, and, in the opinion of the witness for the defense, susceptible of advantageous sale, separately. To have sold these lots separately, would however, have marred the scheme which these trustees had in view, the possession and ownership of all this property, and accordingly the interests of their beneficiaries were sacrificed to those of themselves.

Property immediately adjoining, and as high as these squares, was sold in separate lots, and improved with houses, in 1864.

Why, in the name of fairness then, if square 68, which was the higher for the most part by 6 or 7 feet than the highest part of any of this property, except 40 feet at the corner of 21st and Q streets, and which was immediately contiguous, and could be sold to persons separately in lots, why could not these squares at least have been offered to the public in the same manner? We submit that no one can suppose, who is familiar with the facts of this case,—with the greedy character of these trustees,—that if they had been sellers instead of buyers, that this property would have been offered and sacrificed as it was? We submit that no one can doubt that if they had been in reality disposing of this property, and anxious to obtain the highest price that they would not have smoothed unevennesses, and resorted to subdivisions, as they did, in all cases, where they were sellers, and instead of these two squares bringing only $7,486.88, they would have made them bring at least, we doubt not, as much as square 94, namely 12½ cents per square feet, or $22,427. In other words, and which is the summing up of this part of the case, they bought at a price they would not have been willing to have sold at, and that constitutes fraud.

SALE OF LOTS 94, IN SEPARATE LOTS.

The next step, chronologically, in this sale, was the setting up of square 94. It was this square, like that of square 110, which these men did not seem to want personally. And we find them changing their conduct instantly. When they would be buyers, they sold in bulk; when they would be sellers, they sold in lots. The price, in every instance, thoughout this entire sale of the entire property, responded at once to this course. When sold in bulk, the price was depreciated; when sold so as to invite competition, and to allow the persons present, of reasonable capital to bid, the price went up to fair sums.

Upon one lot in square 94, however, they had set their eyes. It was lot No. 1, and on which an old stable and office was located. Immediately upon its being offered as a single lot, competition was awoke, and they had to pay 10 cents per foot. Then followed the sale of

Lot.	Sq. ft.	Price
6	8,100	13 cents.
	then,	
2	8,913	10½ "
	then	
3	7,341	10½ "
	then	
4	5,753	10½ "
	then,	
5	6,943	14 "

(See page 266),

Averaging, when sold to a stranger, 12½ cents, and that immediately following the sale of squares 95 and 96, at 4 cents.

It is a wonder that, as these trustees, who were the purchasers of 95 and 96, seeing what a disparity of price there was, were not moved to declare to that company that they themselves were the purchasers of 95 and 96, and as 94 had brought so much more by sale in lots, they would re-expose squares 95 and 96 under the same favorable circumstances. But they did not.

PURCHASE OF SQUARE 111 BY TRUSTEE GEORGE W. HOPKINS.

For many years previously to 1861, George W. Hopkins had resided with a large family upon square 111. At that time a two-story and-a-half brick dwelling, about 40 to 45 feet long, and 25 feet wide, with brick kitchen attached, was located near the middle of the square, and the entire square was enclosed and occupied by him. The residence was built by General O'Neill, as a dwelling for himself, and was, in 1864, the largest and finest house in that section of the city. That the house was commodious is apparent from the fact that at about the date of the sale the following persons resided in it: George W. Hopkins, Dr. George N. Hopkins, Cornelius Hopkins, Lizzie Hopkins, Ira H. Hopkins, Mary Hopkins, John S. Hopkins and his wife, Esther E. Hopkins, and daughter, Bertha Hopkins; Mrs. Lilburn, Mrs. Early and her daughter, Mary Victoria Hopkins, Alice Hopkins, Isaac H. Hopkins, Elizabeth Dashiell, Adeline Hopkins, and Emily Hopkins. The house contained nine rooms at that time. This was his home at the date of the sale, and he looked with longing eyes upon it. It is quite natural he did not wish to be disturbed in its possession, or have his broad gardens infringed upon. Secret arrangements had been made with his co-trustee for the purchase of squares 95 and 96.

John S. Hopkins was to be admitted to their purchase, in consideration of his letting George W. Hopkins become the sole purchaser of square 111. A secret agent had been engaged to bid for them. It was not difficult to include square 111 in his purchase. Accordingly, immediately after the sale of 94, 95, and 96, they put up square 111 for sale as an entirety. (Page 266).

Entry in record book of sales of J. C. McGuire & Co., Auctioneers:

Sq.	Lot.	Cont'g Sq. ft.	Price.	Purch.	Amount.
111	0	101,038 & imp.	09.	Jas. Chapman.	9,093.42

and which was knocked down to this same James Chapman, as purchaser, and as the sequel will show as the secret agent for George W. Hopkins.

SQUARE 111 SHOULD HAVE BEEN SOLD IN LOTS.

George W. Hopkins, fearful that the public or his neighbors might desire some of this square, determined to shut them off. They should not be competitors. He wanted this square for himself; he did not wish to be disturbed. It was at that day the fairest and prettiest square of all the property. It was laid out on the maps of the city into 12 lots, ready at his hand for separate and profitable sale (Exhibit R. T. B., No. 21); it was on even grade with the streets; it lay on Connecticut avenue on the one side, and on the other it lay on 20th street, the only street then open west of 14th street, and offered fair inducements to purchasers; but against all these things these men shut their eyes, bent only on the advancement of their own interests. It is true that John S. Hopkins did not join in this purchase, but the evident reason is that for a man without capital or money, he had already involved himself enough in the purchase of squares 94, 95, and 96. And accordingly, forgetting their trusts, they exposed two acres and a half for sale at one time, in the face of the sale of squares 95 and 96, as an entirety at 4 cents, when, immediately afterwards, and immediately before this sale, they secured 12½ cents per square foot for square 94 when sold as separate lots.

One would suppose that when these men found such a discrepancy in price, and an advance of three times as the result of sale in lots, that they would have paused in their fraud. Yet they did not. They had determined to own this estate, and shut their eyes to duty. All competition was therefore cut off, and the scheme was accomplished.

TRUSTEES KNEW THE VALUE OF SUBDIVISION, IN SECURING BEST PRICES FOR LAND.

In addition to the fact that within the same hour of the sale of square 111 as a whole, they had sold square 94 in lots at an advance of three hundred per cent. over 95 and 96, and that before the same company of bidders, and therefore knew the value of subdivisions in securing competition and fair prices, their previous conduct in regard to square 110 demonstrates the fact that they were aware, as far back as 1859, when they were in reality sellers, and not buyers, of the effect of subdivisions.

Accordingly we find, as proved in the testimony, Exhibits R. S. B., 14 and 15, page 1264, that as soon as they came into possession of this property under the trust, that on September 16, 1859, they took square 110, which then was divided into 16 lots, and subdivided it into 52, and sold them separately to purchasers.

With these two facts staring them in the face, the sale of square 94 in lots, and the subdivision and sale of square 110 in lots, when in each case they were sellers, and interested personally in getting the highest price, and then to sacrifice this square by a sale as a whole, when there is not the slightest defence that it might not have been subdivided, is, we submit, the most conclusive and convincing evidence of fraud, and must result, when impeached in a court of chancery, in such sale being overthrown as fraudulent and void.

Such conduct between trustee and *cestui que trust* reaches far beyond what was necessary to be proved in this case in order to set the sales aside. When this relation subsists, the slightest obliquity, the slightest indirection is adequate, on grounds of public policy.

Villa vs. *Rodsiguez*, 12 Wall., 339.
Shaw vs. *Railroad*, 100 U. S., 613.

SALE OF SQUARE 111, AS A WHOLE, OCCASIONED A LOSS TO THE PLAINTIFFS OF OVER $6,000.

As a consequence of the sale of square 111 as an entirety, containing 101,038 square feet, or about 2½ acres as a whole, the price bid was grossly disproportionate to its true value. Mr. Joseph Gawler, a large owner of real estate in the northwestern section of Washington, who attended this sale, and was a purchaser in square 110 of lots, testified as follows, page 275:

Q. What was the comparative value, in your judgment, at that time, of 110 and 111; which was worth most, and how much more was one worth than the other?

A. Well, I should think it would be worth a difference of 5 cents a foot.

Q. Which?

A. Square 111.

Q. More than square 110?

A. Yes, sir.

Q. How should square 111 have been sold in order to have reached its best price?

A. By lots, I think.

MR. ANTHONY HYDE, the venerable and respected confidential agent, for thirty-odd years, of W. W. Corcoran, and entirely disinterested between these parties, and eminently capable of judging of the value of this land, testified as follows, page 305 Pl'tff's test., respecting squares 111 and 110:

Q. Which, in your judgment, were the more valuable of these two squares at that period?

A. I should say that 111 was. Square 110 was next to Holmead's burial ground.

COLUMBUS ALEXANDER, a large property owner in the neighborhood, page 325:

Q. Please state what, in your judgment, square 111 was worth in 1864?

A. My best judgment would be about 15 cents, fronting on Connecticut avenue.

Q. Taking the whole square, what would be a fair price?

A. At that time?

Q. Yes, sir.

A. I should say from 12 to 15 cents.

Mr. CHARLES T. SMITH, a large contractor and builder, and acquainted with the value of land, testified, page 86:

Q. Do you remember those two squares?

A. I know them well. I know every square out there; but I cannot locate them unless I had a map or something of that kind.

Q. In 1864, was square 110 as valuable as square 111?

A. I should not think so.

Q. In your judgment, how much less was it worth in 1864?

A. One hundred and ten is worth, did you say?

Q. Yes, sir.

A. I should not think it is as valuable as 111.

Q. By how much, in your judgment?

A. Well, I suppose there would be a difference of possibly 5 cents a foot, any way.

Mr. William S. Graham followed. He had lived in this neighborhood all his life—on either squares 92 or 94, and was then 60 years old, page 285.

Q. What was square 111, at that date, worth, in your opinion?

A. Well, sir; I should consider that square worth 15 cents a foot for the whole square. It was a nice high, dry square.

It thus appears by the testimony of these witnesses, all competent, all disinterested, not one of them friends to the plaintiffs, that property worth probably 15 cents a square foot, and which undoubtedly, if these trustees had been selling in good faith, interested as they were in the proceeds, as half owner and co-heir, they would have made it bring at least that price. It is true, therefore, that in addition to a loss of $15,930.87, which these *cestuis que trust* sustained in the purchase by these trustees of squares 95 and 96, they sustained the further loss of the difference between 9 cents and 15 cents per square foot in the sale of this square.

101,038 square feet.
6

$6,061.98 making a second loss of $6,061.98.

Loss on 95 and 96	15,930.87
" " 111	6,061.98
Total loss	½)22,092.85
	11,046.42

NO DEFENCE OFFERED OR EXCUSE MADE FOR SALE OF SQUARE 111 AS A WHOLE.

Much effort, as we have seen, was made by the defence to excuse the sale of squares 95 and 96 as an entirety, by attempting to show that their surfaces contained holes and were uneven, and further, that some parts of them were above grade to such an extent as to be not susceptible of sale in lots; but as to square 111, not a syllable of testimony or excuse was offered. It was impossible. The necessity to subdivide was too apparent, and the defendants' counsel acted on the wise maxim, that "the least said the better."

REASONABLE CERTAINTY ALL THAT IS NECESSARY IN CASE OF FRAUD.

The question is again forced on the mind, is this not all proof of fraud, far beyond what is required in cases between trustee and *cestui que trust*. Do not these facts bring the case up to that reasonable certainty, which is all that is required to be proved.

Kempne vs. *Churchill*, 8 Wall., 369.

"It has been frequently said that fraud ought not to be presumed, but must be proved. But the evidence of it is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony."

Neale vs. *Neales*, 9 Wall., 12.

In a case where fraud was charged, the court said:

"As before remarked, the case, as stated, is made out with reasonable certainty, which is all that is required. Any other degree of certainty in a case of this character is unattainable."

Rea vs. *Missouri*, 17 Wall., 543.

"To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

Griffin vs. *Burgess*, 117 U. S.

CONDUCT OF TRUSTEE WHO PURCHASED PROVES THAT THIS SQUARE 111 SHOULD HAVE BEEN SOLD IN LOTS, BECAUSE HE SUBDIVIDED IT, AND SOLD IN LOTS, AFTER HE PURCHASED.

A man's own conduct is ever the best evidence of his motives. What is done is ever the best evidence of what could have been done. On the 6th of August, 1868, with the land in the identical situation it was in when he bought it in bulk (Exhibit R. S. B., 21 and 22), he subdivided original lots 5, 6, 7, 8, 9 and 10, the section fronting on R street, the least valuable portion, and made them number 18 lots. Why could he not have done this for those he represented? The law, and duty, and honor all imposed upon him this obligation.

Again, on Nov. 7, 1870, he subdivided lots 1, 2, 3, 4, 11 and 12, square 111, into 8 lots, average width of 21 feet by 110 deep. And again, on June 17, 1878, the defendant children of George W. Hopkins subdivided 10 lots into 20 lots, including the homestead as one single lot, No. 57.

Why, again, the impartial mind asks, was not this subdivision made for the benefit of the heirs in 1864, when this trustee-purchaser could make it in four years afterwards for himself, and again in two years after that? With what justice or sense of propriety, the impartial mind asks, can these very defendants, who are seeking to sustain their father's purchase of squares 95, 96, and 111, when they, subsequent to his death, were anxious to sell their estate, before they offered one square foot of land, went into the Surveyor's office of Washington, and subdivided square 96 into 58 lots, and the subdivision of 10 lots their father had made of a part of 111, into 20 small lots, and profited by their sales, making this one square yield $50,000 by subdivision-sales?

We submit that this conduct on the part of these defendants operates as a moral estoppel, and prevents them from denying that these things might have been done before, when the trust of old John Hopkins was being executed.

Again, the lesson of this case is enforced upon the mind, that these trustees would not have sold as they did, if they had been sellers instead of buyers. They did not use their best knowledge, they did not bring their best judgment to obtain the highest price, but sold the property to suit their own convenience, and in such a manner that they might stand the best chance to get it at the lowest possible price which they dared to bid.

SALE OF SQUARE 110 IN SEPARATE LOTS.

The next property offered was square 110. This square the trustees did not want to buy, and accordingly, it was subdivided from 16 lots into 52 smaller lots and offered separately, and although not more than half as valuable as 111, by the uncontradicted testimony of witnesses, it yielded on an average a higher price. See account of sales, page 404, Pltff's testimony.

SALES OF ADJOINING SQUARES IN BULK NO EVIDENCE OF THEIR VALUE WHEN SOLD IN LOTS.

To rebut this crushing evidence on the part of the complainants of fraud in the trustees, and the consequent depreciation of price in these squares, the defendants brought forward a number of persons who had bought squares and large tracts of land in bulk. They hoped by proving similar sales, at nearly equal prices, to show that the prices they paid were tolerably fair, and that complainants had suffered no damage. In the case of every witness, the court will notice that after the counsel for defendants had proved what price witness had bought a large tract of land for, he invariably rested; and if the examination had stopped there, the court would have been inevitably deceived. Never was the value of cross-examination shown more clearly than in probing these very witnesses, as to value. For, in every case, as the court will find, that immediately after buying in bulk they confessed they at once resorted, in order to run up the price, to a subdivision, and actually sold in many cases, as it will presently appear, in a few months, at an advance from 200 per cent. to 500 per cent. —doubling and quintripling their money in a few months by this simple process of buying land in large quantities, and, in the language of a veteran at the business—W. W. Metcalf, witness for defence—then "cutting it up."

The first witness they brought forward, as to this point, was Mr. A. P. Fardon. Fardon and the witness Bryant, together bought, in 1867, 140,000 square feet of land, about 3 1-6 acres:

[Referring to purchase of square 134, page 948.]

Q. You sold this land subsequently?

A. I have sold most all of it.

Q. Did you subdivide it?

A. Yes, sir.

Q. How many lots did you subdivide it into?

A. I think I stated that I did not buy the whole square, but all excepting one lot of 10,000 feet. My subdivision was into 66 lots. That included the lot that I did not own.

Q. How many would that make?

A. I said 66 lots, including the lot that I did not own. There may have been 64 or 65 lots. The 65th lot may have been the lot owned by Mr. Shugrue, who joined with me in the subdivision.

Q. What did you get for those lots?

A. I think I sold some at 12½ cents a foot.

Q. And for some how much more?

A. Fifteen cents, 18 cents, 25 cents, and 70 cents a foot, and the last lots I sold, which was a year or more ago, nearly two years ago, were at $1.25 and $1.30 a foot; $1.30 a foot was the highest price I ever sold for.

THOMAS J. BRYANT, page .

[Referring on cross-examination to square 134.]

Q. Did you subdivide?

A. We did subdivide it.

Q. And the sales that you made were made by subdivision into lots?

A. Yes, sir.

Q. What was the general size of those lots?

A. About 2,000 feet.

Q. Twenty by 100?

A. Most of them; some were a little larger.

Q. Why did you subdivide?

A. For the purpose of selling.

Q. You thought you could get a better price by subdividing it?

A. Yes, we expected to.

Q. When did you begin to sell?

A. I think the first sale we made was in 1869. I think we got about 13 or 14 cents. We got for some of the most desirable lots in the square on corner of Q and 19th streets, I think, about 14 cents; some of them we sold for 8 or 9 cents.

The next witness introduced for defence was Mr. ROBERT C. MURPHY, page 682 Def'ts' test.

Exchanged with Caleb Cushing, at St. Croix Falls, property for an undivided one-sixth interest in sq. 133, in 1863, at 4 cents a foot; yet at this moment G. W. and John S. Hopkins were selling in the adjoining square property at 10 cents a foot.

Subdivided it into lots, and in the next year sold for 12 or 12½ cents a foot, lots 25x100 (page 682).

The next witness called was W. W. METCALF. Square 132 was only one block south of Boundary street. He proved, on his examination-in-chief, that he bought the half of square 132, as a whole, for 7½ cents. But, on cross-examination, gave the following testimony, page 722, Def'ts' test.:

Q. You bought part 131, did you not, or the whole of it?

A. One hundred and thirty-two, the east part of it.

Q. What did you do with that after you bought it?

A. Cut it up.

Q. What do you mean; why did you cut it up?

A. To make it into lots.

Q. You subdivided it?

A. Yes, sir.

Q. What did you give for square 132?

A. Seven and a half cents a foot.

Q. What did you sell it for?

A. From 15 cents to 25 cents a foot.

Q. How soon after your subdivision did you begin to sell?

A. Began a few months after; say, in the next spring.

Q. You could not have obtained such prices as that if you had sold out in bulk, as you bought it, could you?

A. No, I think not.

Q. What did Mr. Starr do with square 131?

A. He subdivided it and sold it on monthly payments.

Q. What did he get for it?

A. I should say from 15 to 25 cents a foot.

Q. It is very much farther out towards Boundary street than squares 95 and 96?

A. Square 131 is bounded by Boundary street on the north, on the south by T street, on the west by 19th street, and on the east by 18th street.

Q. What did he give for square 131?

A. Six cents and a fraction a foot.

Q. And what did he sell it for?

A. From 15 cents to 25 cents a foot.

Q. Did he begin to sell pretty soon after buying?

A. A few months after, he began to sell.

* * * * * *

THOS. P. MORGAN, at page 912, Def'ts' test:

[Bought his place in lump at 2 cents a foot in 1864; very high, rolling land out of the city limits, and probably more than 40 feet high, and may be 90 feet.]

Q. You bought your property in bulk, did you not?

A. Yes, sir.

Q. Did you ever subdivide it?

A. Yes, sir.

Q. Into how many lots?

A. The first subdivision was into—I forget certainly—some 8 or 10 lots.

Q. Then did you make a second subdivision?

A. Yes, sir.

Q. How was that?

A. Into some four lots; and then I retained the house and about six acres, which was afterwards sold separately.

Q. I suppose the reason you subdivided it was that you could get a higher price for it?

A. Yes, sir.

Q. Make it yield more?

A. Yes, sir. Etc. [913.]

Q. Did you increase the price of it by subdivision?

A. We think we did.

Q. Very considerably?

A. Yes, sir. We got more for it in small parcels. We could not get a bid for it in quantity, so we cut it up in small parcels.

Q. It yielded you handsomely?

A. Paid very well. I forget what the prices were; what the rear part brought. I was trying to think what it brought, but I do not remember now.

WASHINGTON B. WILLIAMS, another witness for defence, testified, page 673. Def'ts' test.:

[Green, Williams, and Wollard bought north half of square 97, in 1866 or 1867; cost, 5½ cents.] * * *

Q. Did you subdivide your square?

A. Yes, sir.

Q. You bought as a whole?

A. We bought one part of the square as a whole.

Q. And they subdivided it?

A. Yes, sir.

Q. And sold the lots in the subdivision?

A. Yes, sir.

Q. You did not sell it as you bought it?

A. No; of course not. [673.]

Q. Why do you say of course not?

A. We thought it better.

Q. You have done such things before?

A. We wanted to turn the property over to the best advantage, and we wanted to sell. We did not know then that the city was going as it has. The best way to get the highest price, probably, was to divide it so as to have the highest number of purchasers; and that is why that square is not as valuable as square 97; (95) because it is built up in a different way.

Q. When did you begin to sell your lots?

A. I suppose in about 6 months after it was all sold, in a year after.

Q. What did you get on an average for your land?

A. I guess on an average, I cannot tell, but probably we got 11 cents or 12 cents a foot. But we subdivided and graded it, and it cost us something to do that when we sold it.

Witness could not say that the grading cost as much as $300 or $400 or $500, but more than $200.

Gould vs. *Chappell*, 42 Maryland, 467:

"By the will of a testator who died in the year 1859, a portion of his real estate was devised to trustees, who were directed to sell the same after the first day of January, 1870, either at public or private sale, in their discretion, and in such lots or parcels as they might deem best; the proceeds arising from said sale or sales to be distributed to certain persons named in the will. Held—

The discretion thus reposed in the trustees was not a mere arbitrary discretion, but a discretion coupled with a trust, and to be exercised solely for the benefit of the *cestuis que trust*. It was their duty, therefore, in making a sale of the property to act in a prudent and business-like manner, with a view to obtain as large a price as might, with due diligence and attention, be fairly and reasonably obtainable under the circumstances. In other words, to exercise that diligence and caution which a careful and prudent owner would observe in the sale of his own property. If the sale be made under circumstances of haste and imprudence, or if the trustees fail in reasonable diligence in inviting competition, or adopt an injudicious and disadvantageous mode of selling the property, a court of equity ought not to ratify the sale.

Ord vs. *Noel*, 5 Madd., 438;
Harper vs. *Hayes*, 2 Giff., 210;
Turner vs. *Harvey*, 1 Jac., 178;
Bridger vs. *Rice*, 1 Jac., and Walk., 74;
Mortlock vs. *Butler*, 10 Ves., 292;
White vs. *Cuddon*, 8 Cl. and Fin., 766.

In the exercise of the discretion thus conferred upon them, it was the duty of the trustees to act in view of the circumstances existing at the time of the sale, and not at the date of the will. The will was admitted to probate in 1859, and the property was sold in 1872. We all know what a difference an interval of a few years makes in the value of unimproved real estate lying upon the outskirts of a growing city, and what might have been a judicious mode of selling this property in 1859, may be an injudicious and disadvantageous mode in 1872, thirteen years afterwards. In this case twenty acres of land, lying within the limits of a growing and prosperous city, were sold as an entirety for the sum of $2,500 per acre. The trustees, in their report, say they have frequently, since the first of January, 1870, endeavored to sell the property, in question, at public auction and private sale, both in small and large parcels. The proof shows that the twenty acres were offered once at public sale as an entirety, and that one of the trustees had offered the same to several purchasers of real estate at private sale, but at prices far in advance of what the tract was sold to the appellee.

It does not appear that any effort was made to sell so valuable a tract of land either *in building lots* or *by the front foot*, although Charles and Hanover street extended, two of the principal business streets in the city, pass through the property. We are satisfied, from the proof in the record, that this property ought to have been sold, or at least offered for sale, in building lots or by the front foot. In addition to the testimony of witnesses who say that, in their judgment, this was the proper and judicious mode of selling the property, we have the fact that the tract of land adjoining, known as the Methodist Graveyard, containing six acres, was sold by the front foot, within nine months after the sale made in this case, and brought over $5,000 per acre. And it is doubtful, to say the least, whether it was intrinsically more valuable than the property sold by the trustees; one witness thinks there was, perhaps, four to five hundred dollars difference in favor of the graveyard property.

The fact that the trustees were anxious to put money in the hands of some needy *cestuis que trust*, is no excuse for adopting an injudicious and disadvantageous mode of selling the property."

In *Ord* vs. *Noel*, 5 Madd., 440, Sir John Leach said:

"Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of their trusts they will pay equal and fair attention to the interests of all parties concerned."

In that case, the court refused to enforce the contract of sale, because the trustees, influenced by the conduct of one of the creditors, who was anxious that money should at all events be immediately raised, adopted a disadvantageous mode of selling the property in one lot. * * * *

Where, however, a sale is made under a deed or a will and the trustee is clothed with large discretionary powers in regard to the time, manner and terms of sales, such a sale being coupled with a trust, it is the duty of the trustee to bring the property to the hammer in a judicious and advantageous manner, and if he fail to exercise that caution and prudence which may fairly and reasonably be expected from a provident owner in regard to the sale of his own property, and, in consequence thereof, the property is sold at a depreciated price, a court of equity will not sanction such a sale, even though the conduct of the trustee may be untainted with fraud and purchaser be without fault.

PLAINTIFFS' CASE PROVED BY THE ABOVE WITNESSES FOR DEFENCE.

We have thus gone through the entire defence offered, and shown that on cross-examinatisn each and every one of their witnesses have proved in their own conduct the case for the plaintiffs.

Square 134, bought at 7⅓ cents, subdivided, and sold at an average of 25 cents.

Square 133, bought at 4 cents, subdivided, and withdrawn from sale at 12½ cents.

Square 132, bought at 7½ cents, subdivided, and sold at an average of 20 cents.

Square 131, bought at 6 cents, subdivided and sold at an average of 20 cents.

Land in county, between Kalorama and Meridian Hill, subdivided and sold at large advance.

Square 112, bought at 4 cents, subdivided, and sold at 10 to 12½ cents.

Square 97, bought at 5½ cents, subdivided, and sold at 11 and 12 cents.

This array of facts constitutes a stronger case than the mere opinion of witnesses, and proves, in the most convincing and irrefragable manner, that when men are honest in obtaining the highest price for land they invariably sell in small quantities, unless they are inexperienced, or forced to sell quickly. No inexperience can be claimed for these trustees, as they practised the art of subdivision as early as 1859 as to square 110, and ever afterwards in regard to each of these squares.

Is it not the law that equity requires that these trustees shall have acted as well for the *cestuis que trust* as they did for themselves? Is it not further the law that trustees shall not profit by their trust, to the detriment of those they represent? In both of these duties, we submit, they signally failed.

RULE OF LAW WHEN A TRUSTEE MAY BUY OF HIS CESTUI QUE TRUST.

The rule of law, as now firmly settled, is that a trustee may buy of his *cestui que trust,* provided there is a distinct and clear contract to that effect, made under such circumstances as indicate that the *cestui que trust* was aware of the correct value of the property, that the trustee had no special knowledge of the value of the thing bought, which was not also possessed by the beneficiary, and that no undue influence arising out of the trusteeship was brought to bear on the mind of the *cestui que trust*—in a word, that they stood at such length to each other as amicable buyer and seller sustain ordinarily one to the other.

THE RULE THAT A TRUSTEE MAY BUY OF HIS CESTUI QUE TRUST, DOES NOT ALLOW HIM TO BUY AT HIS OWN SALE.

Although the rule is, as we have seen in the preceding paragraph, that a trustee may buy of his *cestui que trust,* when the sale will stand the strictest judicial investigation, yet it has been distinctly decided that the relaxation does not extend to a purchase by a trustee at his own sale—such a sale is *ipso facto* voidable by the *cestui que trust,* on ground of public policy.

Mr. Levin, the leading authority in England on the subject of trusts, in the latest edition of his valuable work, sums up the state of the law as it exists to-day; namely, that although a trustee may, under circumstances of fairness, buy of his *cestui que trust;* yet he cannot buy, either directly or by an agent at his own sale at public auction, of either land or chattels.

The English doctrine, as summed up in the last edition of Levin on Trusts, is:

'*First.* The extent of the rule. [438]

1. A trustee for sale, that is a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property, whether it be real estate or a chattel personal, etc.; whether the purchase be made in the trustee's own name; or in the name of a trustee for him, by private contract, or public auction, from himself as the single trustee, or with the sanction of his co-trustee; for he who undertakes to act for another in any manner cannot, in the same matter, act for himself. * * *

7. When it is said that a trustee for sale may not purchase the trust property, the meaning must be understood to be that the trustee *may not purchase from himself;* that is, he cannot perform the two functions of seller and buyer; for there is no rule that a trustee, whether for sale or otherwise, may *not purchase* from his *cestui que trust.* Hence, while a purchase by a trustee conducting *the sale*, either personally or by his agent, cannot stand, a purchase by a trustee, from a *cestui que trust*, may stand, if the trustee can show that the fullest information and every advantage were given to the *cestui que trust.* However, a purchase by a trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the courts will watch with the utmost jealousy; and the exception seems, it is said, so near the verge of the rule, that it might as well have been included within it."

This same doctrine was early expounded in *Michoud* vs. *Girod*, 4 How., 552. This decision is peculiarly similar in facts to the present case, and has been constantly cited with approbation in the later decisions of this court for its manly purity and healthful principles.

At page 557, it sums up:

"If a trustee or person acting for others sells the trust estate and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside and the property re-exposed to sale, under the direction of the court. And it makes no difference in the application of the rule that a sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase for himself, but that a third person, by previous arrangement with the executor, became the purchaser to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestuis que trust.* The inquiry, in such a case, is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestuis que trust*, and a re-sale ordered on the ground of temptation to abuse, and the danger of imposition inaccessible to the eye of the court."

Affirmed in 22 Wall., 340. Same principle held in Pennsylvania, New Hampshire, Massachusetts, and many other States.

"Fullness of price, absence of fraud, and fairness of sale are not sufficient to countervail this rule of policy."

Armstrong vs. *Huston's Heirs*, 8 Ohio, 554.
Ricketts vs. *Whittington*, 15 Md., 46.
Jamison vs. *Glascock*, 29 Mo., 191.
Woodruff vs. *Cook*, 2 Edw. Ch. R., 261.
Spindler vs. *Alomson*, 3 Md., 410.
Hone and Wallace Leading Cases in Eq., 209–214.
2 Stockton, 98.
5 Blackford, 510.

CONCEALMENT BY THE TRUSTEES OF THEIR PURCHASE.

The trustees, George W. Hopkins and John S. Hopkins, having successfully bought the squares 95 and 96, and square 111 through their agent, at a loss to the estate as we have shown of $15,930.87 as to squares 95 and 96, and of $6,061.98 as to square 111, making a total of $22,092.85, they caused his name, James Chapman, to be announced at the sale as the purchaser (proved by Richard Sinclair, witness for defence); they caused his name to be recorded in the auctioneer's book of sales as the purchaser (proved by Thos. J. Fisher, auctioneer, and account of sales); and allowed the fact that said Chapman was the purchaser to be published in the *Evening Star* newspaper to be uncontradicted (proved by S. L. Phillips).

Thus, so far, as it was possible, every step to deceive those interested had been taken, and to impress upon them the belief that this stranger to them, James Chapman, had been the purchaser, and the sale therefore *bona fide*.

FALSEHOOD AND SECRECY IN DEEDS FROM CHAPMAN TO TRUSTEES, AS INDIVIDUALS.

The title was not yet vested in them. It was necessary for deeds to pass. Here again falsehood and secrecy, which always accompanies fraud, were resorted to. Accordingly, on the 20th day of May, 1864, ten days after the sale, George W. Hopkins, for himself, and George W. Hopkins and John S. Hopkins, as executors and trustees of John Hopkins, executed a deed to this James Chapman, conveying lot 1, square 94, all of squares 95 and 96, and subdivision lots 16, 17, 18, 19, 20, 21, 22, 38 and 39, square 110; and on the same day, evidently contemporaneously, the said Chapman was made to re-convey to these two men, as individuals, the above property, which they had held in trust. Now, what is most remarkable, is that these two men wished at the same moment to prevent a fraud upon themselves, and to perpetrate one on their *cestuis que trust.* Their own evil designs made them suspicious of even this Chapman, their trusted friend.

Inasmuch as they must put the title in Chapman before he could re-convey it to them, even for this instant, they feared he might prove false, and, accordingly, the consideration recited in their deed to him was one dollar. This single dollar would, in a suit, be evidence against Chapman; he was not the real purchaser if he should disavow his agency in the short interval of these men signing their names. That accomplished, Chapman being true to them, it was next important to deceive the heirs, and to make them believe that they had bought the property from Chapman in good faith. We, therefore, find a deed, prepared under their instructions, from this man Chapman to them, as individuals, conveying the property last above mentioned, and executed on the same day, and probably contemporaneously, with their deed to Chapman containing the recital of the direct and palpable falsehood that Chapman had sold this property to them for the consideration of $10,840.24, paid by them to him. (Vide exhibits Hopkins, 4 and 6, filed with the original bill, and admitted, pages 19 and 21.)

Contemporaneously with the above transaction, the trustees made another conveyance to Chapman of square 111, consideration $1, and immediately thereafter Chapman re-conveyed to trustee George W. Hopkins for the falsely recited consideration of $9,093.44.

Why these falsehoods, if not to deceive? Why any falsehood, if not to deceive? Deception is the father of lies. And these trustees would have recited the truth if there had been no intention to deceive. They were laying their foundations to support their false titles; they expected that it might be—it would be—asked by some one, How do you come to own this property? and in order that they might silence inquiry and stop the superficial investigation of the incompetent, they could point with confidence to their deed from Chapman, from whom it would show they had purchased and to whom they had paid their money. Would this not stagger women, and girls, and drunken young men?

THE SUPREME COURT OF THE UNITED STATES, STATE THAT A DEED CONTAINING FALSE RECITALS, IS OPEN TO WELL GROUNDED SUSPICIONS THAT FRAUD PROMPTED THE FALSEHOOD.

Thirvas vs. *Caig*, 7 Cr., 51 :

"It is not to be denied that a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable, fairly and plainly to state the truth."

SECRECY IN DELAYING THE RECORD OF THEIR DEEDS.

Men who buy land *bona fide* are usually prompt to record their deeds. Frequently the same day, the next hour, after they have received their title, finds them wending, sometimes hurrying, to the record office, to record the evidences of their ownership. When business men delay, who are accustomed to deeds as these men were, there is usually a cause. These trustees were suspicious. They were naturally, as the evidence of their acquaintances portrays them, close-mouthed, secretive. The best manner to manage this business, was to lay low, say nothing, see how the heirs took their continued possession of the property, and accordingly we find them keeping these deeds executed, May 20th, 1864, locked up in their possession until the 16th November, 1864, on which day they were all recorded. (See deeds filed with bill, pages 19 and 21.)

Now, it so happened that under the laws of the District of Columbia, at that date, that if a deed was not recorded within six months after its execution, any subsequent conveyance to a *bona fide* purchaser would have priority over the first purchase. These trustees delayed for 5 months and 26 days before they recorded their conveyances—as long as they dared, as they still feared Chapman might convey to another—secreting from these *cestuis que trust* that length of time what they contained, and therefore being free in the interval to take any step in the interval that they might conceive or be advised necessary, in order to support their false title, without being hampered or estopped by the evidence of these deeds.

But their *cestuis que trust* were confiding. These men treated them in those days, as shown by the evidence on both sides, as their children—lived under the same roof with them, ate at the same board, and were honored by them as father, brother, and friend. This man, George W. Hopkins, played, as long as the money of the girls lasted, the role of father to them, and they, taught by the words of their own father's last will, reposed in him the fullest confidence. No suspicions were therefore aroused; the sales were received as all right; that their uncle and brother had bought of Chapman as they were taught to believe, and these men accordingly recorded their deeds, when they dared secrete them no longer, and by which, we submit, one of the worst frauds ever committed upon a sacred trust was accomplished.

DEFENCE, THAT CESTUIS QUE TRUST ACQUIESCED IN THESE PURCHASES BY THE TRUSTEES.

The defence offered to all these frauds is that these women and girls, and dissipated young men knew that the trustees intended to buy the land, and acquiesced in the purchases.

In the first place let it be remarked that a *cestui que trust* cannot be deemed to have acquiesced in the acts of a trustee except upon the clearest evidence that the *cestui que trust* fully understood all the material facts; and secondly, that although a trustee may buy of his *cestui que trust*, when they stand on equal footings and upon clear evidence that no undue advantage was taken; yet it never has been held that under any circumstances may a trustee buy at his own sale.

Let us see, therefore, in view of these principles of law, what the witnesses for the defendant say, and how they make out knowledge and acquiescence.

It will be observed that this so-called knowledge and acquiescense, by these young women and girls, is attempted to be proved by the nearest and dearest relatives and dependents of the defendants.

ELIZABETH J. DASHIELL, the sister of the defendant, Esther E. Hopkins, wife of John S. Hopkins, trustee, after swearing, in answer to leading questions, that it was known in the family that George W. and John S. Hopkins had bought at the sale, on cross-examination, testified, 751 appellants' testimony:

Q. It was a general talk?

A. Yes, sir.

Q. You understood personally that they had bought the property?

A. Yes, sir.

Q. You paid no special attention to it at that time?

A. No, sir.

Q. There was nothing to impress on your mind, at this length of time, who were present, and who stated one thing and who stated another?

A. Certainly not.

Q. You are simply giving your general impression?

A. Yes, sir.

In that house, at that time, the following persons resided, and among whom there might have been much talk without it reaching the ears of either of the complainants. It will be noticed that none of these witnesses anywhere identify any one of the plaintiffs, but confine themselves to speaking of the family at large or generally:

Mrs. Lilburn, Mrs. Early, her daughter, Vic Hopkins, Alice Hopkins, Isaac H. Hopkins, Elizabeth Dashiell, Adeline Hopkins, Emily Hopkins, George W. Hopkins, Lizzie Hopkins, Ira H. Hopkins, Cornelius Hopkins, Mary Hopkins, Dr. George N. Hopkins, John S. Hopkins, Esther E. Hopkins, Bertha Hopkins, living in the house at about the time of the sale in 1864.

But what kind of knowledge was it that these trustees conveyed to their *cestuis que trusts?* What did they tell them, so as to show that knowledge, from which acquiescence may, in law follow? Let this partial witness speak for herself. She is for the defence. Page 752, 753, appellants' test:

Q. Was there any intimation, at that time, by either George W. or John S. Hopkins, that they got the property for less than its true value?

A. No, sir.

Q. You never heard, at any time from them or from anyone, that the heirs of John (S.?) Hopkins had been defrauded in this matter?

A. No, never.

Q. You did not believe it?

A. No, sir.

Q. And you do not believe it now?

A. No; I do not.

Q. So far as you understood, the property brought its full value?

A. Yes; its full value; and a great many people thought it brought more than its value.

Q. It was looked upon then as a sale particularly conducted for the interest of the heirs?

A. Yes, sir; it was.

Q. You never understood from them in any of these conversations that they had taken unfair advantage in the sale?

A. No, sir; I never did.

Q. It was never talked of in the family that any unfair advantage had been taken by either party?

A. No, sir; they were perfectly satisfied.

Q. These two gentlemen, G. W. and John S. Hopkins, never stated that they had bought the property under advantageous circumstances for themselves and disadvantageous circumstances for the trust they represented?

A. No, sir; I never did hear them say so.

Q. You never heard them say what the price was?

A. No, sir; they might have stated it when I was not present.

Q. You never heard them say whether the property had been put up in lump or separately, or anything of the kind?

A. No, sir.

Q. No explanations were given of the particulars of the sale?

A. It was all explained, I suppose, but I was not present when it was done. I am just speaking of what I know.

We submit to the court that this witness proves the appellee's case.

She proves, first, that there never was any intimation, by either of these trustees, that they got the property for less than its value. We have shown it sold for $22,092.85 less than its true price.

She proves, secondly, that it was represented and believed by all the members of the family, including the appellees, that the property had brought its full value.

She proves, thirdly, that it was represented to and believed by these appellees that this sale of May 10th, 1864, was conducted particularly in the interest of the heirs.

She proves, fourthly, that not a breath of suspicion as to the fairness of the sale had been aroused in the minds of the apellees, and, therefore, there was nothing to put them on inquiry, or charge them with negligence.

She proves, fifthly, that no explanations were given of the particulars of the sale, as to whether the land had been sold separately or in bulk.

On the contrary, if the court please, we say that this witness has, in the most positive manner, unwittingly, it is true, proved that the appellees had no knowledge of the circumstances of this sale—no suspicion of its fairness, and consequently, no notice or acquiescence in the unfairness or fraud.

The appellees, in a case of trust, where trustees are purchasers of themselves, where the slightest taint rottens all, might rest their case here. But, as it will be seen, these same facts are proved over and over again in the cross-examination of every witness for the defence.

That this witness has no partiality for the appellees is shown by her testimony on page 749, appellee's testimony.

The next witness called by the defendants was Mrs. Georgia L. M. Raub, sister of Mrs. John S. Hopkins, and aunt of Bertha Hopkins, now Hammond, principal appellants.

This witness, in answer only to leading questions, stated that she heard that these trustees expected to buy at the sale; but even cross-examination could not make her declare from whom she heard it. There is, therefore, no knowledge brought home to any one of these plaintiffs. (Page 755, Def'ts' testimony.)

Q. In your visits to the family, before the sale, do you recollect hearing any conversation as to who was expected to buy the property at the sale, and if so, state what you heard?

A. I heard that they expected to buy it and carry on the business.

Q. Who do you mean by they?

A. I mean George W. and John S. Hopkins.

Q. You heard that at the house from members of the family?

Mr. PHILLIPS. Objected to as leading and suggestive.

A. Yes, sir.

Q. Can you say who told you that?

A. No; I cannot say any one in particular.

Cross-Examination.

[Referring to the sale in 1864.] [756.]

Q. You did not give yourself any special concern about this business at that time, did you?

A. None at all.

Q. You did not anticipate any trouble?

A. None whatever.

Q. And, therefore, you did not take any particular notice?

A. I did not tax my memory at all, or think anything about it.

Q. There was no suspicion in your mind of any unfairness or irregularity in the sale?

A. None whatever.

Q. There was nothing, therefore, to impress upon your mind any particular conversation, or who was present at them?

A. None at all.

Q. Nor who were talking?

A. No, indeed. I suppose it was all fair and secure, and I did not think anything about it. If I had known that it was ever to be brought up in court, of course I should have thought something of it then.

Q. Therefore you are not able to identify any conversation, or who were present, or who heard them?

A. No, sir.

Q. And particularly after this long lapse of time?

A. No, sir.

Q. You do not know whether you heard it from George or John?

A. I do not know that I heard it from either one.

Q. Nor when you heard it, nor who were present when you heard, nor who were present at these various conversations?

A. No, sir.

Q. Whether one party or the other?

A. No, sir. Etc., etc.

Q. There was no intimation at any time of the property having brought less than what it was worth?

A. Nothing.

Q. Or had been sold under disadvantageous circumstances?

A. It was considered it was sold at its full value.

Again, it is submitted, that instead of this witness proving, as she was called to show, knowledge and acquiescence on the part of these women and girls, she proves on cross-examination that they, in fact, had no knowledge of these frauds, and therefore never acquiesced in them.

The next witness called for the defence was Mrs. Esther E. Hopkins, widow of John S. Hopkins, and one of the principal defendants, because she received one-third of his estate for life—this very land in dispute.

In answer again to leading questions, she proves it was known in this large family that the trustees were to buy, but nowhere does she specify any one of the plaintiffs as having heard such statements. It must not be forgottten that the appellees were then young ladies, with minds more bent on society and pleasure than business. But, on cross-examination, this witness proves that she is unable to identify any conversation within six months (page 351), and if this is so, not much credit for accuracy can be given as to who heard them, or who were present. It is doubtless true that these two men, living in the same house together, would talk often in the presence of their wives and own children, and sisters, of their projects in regard to this property, when they would carefully avoid all observation in relation to the subject when either of the appellees were present. And these ladies, remembering these confidential communications to which they were admitted, and not knowing of the secret frauds committed, might readily suppose, at a distance of twenty years, that they were general; there being, as they all swear, nothing to impress the subject on their minds.

Esther E. Hopkins, appellant, page 764, def'ts' test.:

Q. Before the sale took place, I would be glad to know if there was any conversation in relation to George W. and John S. purchasing at the sale, and if so, what?

A. My uncle, George W. Hopkins, and my husband John S. Hopkins, told the family that they were going to buy the brick-yard property; that they would give as much for it as any one else; and none of them objected at all.

Assuming, therefore, the fact to be as stated by this defendant, yet in view of the preceding discussion of testimony, it is the most direct and irrefragable evidence of positive fraud by these trustees, and injures the defence infinitely more than it benefits it, for it proves that while they said they intended to buy it, it contained the express and positive promises that if they did, "they would give as much for it as any one else." This promise implied a fair and honest sale under circumstances calculated to obtain the best prices, instead of a manipulation of the sale to crowd out all small competitors. It contains, besides, an estoppel against these defendants from asserting that the appellees were negligent in not bringing this suit sooner, because, if true, they had an undoubted right to believe and rest on the assurance (as the trustees, in fact, bought) that the sale was *bona fide*, and prices as much as others would have given.

This witness, on cross-examination, clinches the nail again, as to the fact that the conduct of the trustees was apparently so fair as not to awaken any suspicion in herself, and for the like reason in the appellees.

Esther E. Hopkins, def't, page 780:

Q. When this sale took place, and your husband and uncle, George W., bought this property, you had no reason or suspicion that their title was not good, had you?

A. No, sir.

Q. You did not suppose but what they had acted perfectly honorable with the heirs, had you?

A. I think they acted very honorable indeed.

Q. You had no suspicion that any fraud had been perpetrated, or undue advantage taken?

A. No; I did not. Etc., etc. [Page 784.]

Q. What did your husband (John S. Hopkins) think about it?

A. He stated that the property brought as much as it was worth, and Isaac H. said the same thing.

Q. Did they also say that the property had been sold under the [351] most advantageous circumstances?

A. They did not say anything about it.

Q. What was understood, that it brought as much as it was worth?

A. That it brought as much as it was worth.

ADELINE HOPKINS, aunt of appellants, and an inmate of Mrs. Elizabeth Luttrell's house, who is an appellant, and supported by her. By leading questions exclusively, by the defence, attempted to show that witness heard George W. and John S. Hopkins were to buy the property, and did buy it through Chapman. Page 805, Def'ts' test:

Q. You never suspected wrong about this purchase by George W. and John S. Hopkins?

A. None at all. I never heard one word of dissatisfaction, one way or the other.

Q. You never had any suspicion yourself that they took advantage of the heirs?

A. No, I never did. I had no right to; I had no reason to have. They were just, upright, and honest men.

The next witness called by the defence to prove knowledge and acquiescence was Mrs. Eliza Dashiell, the mother of Mrs. Esther E. Hopkins, and grandmother of Bertha Hopkins, both principal appellants, from the amount of property still held by them.

This witness was deemed so important as to be examined *de bene esse;* and again in the regular course of the testimony for the defence she swore in chief, in answer almost exclusively to leading questions, that it was known in the family that the trustees were to buy, and after the sale, that they had bought; but in no instance is she able to identify the person who was present, nor does she swear that any one of the plaintiffs heard these conversations. A fair sample of how far the old lady's testimony is the result of memory, or of conjecture, may be illustrated by the following extract from her cross-examination, at page 816, def'ts' testimony:

[Referring to Mrs. Lilburn.]

Q. Was she satisfied with the sale?

A. I never heard anything to the contrary; nothing but that she was perfectly satisfied; she got her money, I know; I am certain of that.

Q. How do you know that she was satisfied when she did not tell you so?

A. I did not hear anything to the contrary. I did not say that she told me, but I heard it from others.

Q. Then your conclusion that they were satisfied is from the fact that you heard no dissent?

A. None at all.

Q. No dissatisfaction.

A. No, sir.

Q. From that you judged they were satisfied?

A. Yes, sir. Etc. 816.

Q. You never interrogated them as to their being satisfied or not?

A. No, sir.

Q. And you never heard them say that they were satisfied or not?

A. I never heard them say that they were dissatisfied.

Q. How do you know that they all wished the property to be sold?

A. Because I supposed that they all agreed to it.

Q. You did not hear them say so?

A. I did not hear them say so, of course; but if they had not been satisfied, it is very strange that they were not dissatisfied before now, it being 20 years ago or more. * * * 819.

Q. You think that George W. and John S. Hopkins were honest and good men?

A. I do; I know it; I never heard anything to the contrary.

Q. And you think the property brought its full price?

A. Yes, sir; and other persons thought so too.

Q. You had no suspicion about anybody being cheated or robbed?

A. No, sir; it was on the other side, I should think, if anything was going on.

Q. What do you mean by that?

A. Because I think they were honest men, and would rather give than take.

Q. You had so much confidence in them as that?

A. I have.

Q. And all the family had the same confidence?

A. Yes, sir; they had at that time.

If it be true, as shown in the foregoing pages, that these men sold to themselves at a price they would not have parted with to others; that they used their authority and power as trustees to expose this land in large quantities, instead, as they had the power, at private sale, and public sale in smaller quantities, as they did for themselves, and thus bought for less and differently than they would if they had been prohibited from buying, then this witness, this lady, brought forward as a leading witness, has not only proved no knowledge or acquiescence of these frauds, but has proved, in the strongest and most convincing terms, that these men were guilty of the express, positive, and active fraud of representing to these plaintiffs that the land brought its full value and price; and it is submitted that, after such representations, the defendants are estopped to claim laches on the part of the plaintiffs until they have clearly shown that their previous false statements were untrue.

SUGGESTIO FALSI OF THE TRUSTEES IN REGARD TO THE SALES.

In addition to the testimony of the witnesses for defendants, and particularly that of Mrs. Esther E. Hopkins, at page 805, cited above, where she swears that her husband declared the property brought all it was worth, we ask particular attention to the following clear and explicit evidence of Mrs. Eliza Dashiell, the mother of Mrs. Esther E. Hopkins, defendant, and grandmother of Bertha Hopkins, sole heir of John S. Hopkins, trustee, pages 812–813, Def'ts' test.:

Q. You did not suspicion anything about this sale being illegal or fraudulent?

A. Of course I did not. I think it was all right.

Q. You had nothing, therefore, to impress its circumstances upon your memory particularly?

A. I knew it all, and I recollect it all perfectly well.

Q. But you had nothing to impress it on your memory?

A. No, sir; because I thought it all right, and nothing more about it, and it was all satisfactory.

Q. The price you thought the property brought was a first-class price, did you not?

A. I thought so, and it was thought sufficient by everybody. I did not suppose that anybody else would give that much for it at the time.

Q. Did you ever hear George W. say that the property brought its full price?

A. Yes, sir; he said that it brought its price at the time.

Q. Its full price?

A. Yes, sir; its full price; and they, the children, thought so too.

Q. I am asking you about what George W. stated?

A. I have told you what he stated.

Q. Did you ever hear John S. Hopkins state that the property brought its full price?

A. Yes, sir; he said that it brought its full price.

Q. That is what they represented to you all—that the property brought its full price?

A. Yes, sir; and what every person else did represent.

Q. But they were the best judges, were they not, of what the property brought—whether it brought its full price or not?

A. They were pretty good judges.

Q. They were better judges than girls or women?

A. Yes; of course.

Q. They were the head of the family, were they not, after the death of old John Hopkins; that is, George W. and John S. Hopkins were the head of the family?

A. Yes, sir.

Q. They had the business management of the family?

A. Of course; it was left to them. There was no person else.

Q. The family looked up to them and their judgment?

A. Yes, sir.

Q. About all business transactions?

A. Yes, sir; there was no person else to look up to, in the way the business was left.

Q. What they stated about business matters was not disputed?

A. No, sir; because they had confidence in them that they would do what was right. He left it in his will that he had confidence in them.

Q. Mrs. John S. Hopkins, your daughter, had no special business capacity, had she?

A. I do not know that she had. She looked to her husband for everything. She never interfered with his business whatever, because he was capable of attending to it himself.

Q. So, with the balance of the children, they looked to their uncle, George W. Hopkins, and John S. Hopkins, did they not?

A. Yes, sir.

Q. They thought whatever they said was right?

A. Yes, sir.

No testimony offered on the part of the plaintiffs, even by the plaintiffs' own oaths, is near so strong as this unwitting tribute to truth. These defendants will not impeach the veracity of their own witness, their principal witness. She proves that—

1st. George W. and John S. Hopkins were the head of the family, and looked up to as such, by the plaintiffs, after the death of their father, John Hopkins.

2d. That no suspicion rested on these sales, so carefully and secretly were they conducted—if no suspicion was awoke in the mind of the witness or the family, then no negligence can be charged against the plaintiffs. The law of trusts presumes that the *cestui que trust* may repose in confidence in the trustee, and where the latter has so adroitly managed the estate as to cover his fraud, and allay, or rather not even excite suspicion, that the beneficiary is not chargeable with the laches until some notice of the fraud is brought home to his knowledge.

3d. This witness proved the very fact that Mrs. Lilburn testified to, one of the heirs who, under the advice of counsel, gave away her interest in the estate, to enable her to prove, namely, the positive assertion to the plaintiffs, by both George W. Hopkins and John S. Hopkins, that the property brought its full price—thus establishing the fraud of these men, thus lulling these plaintiffs and bringing the case within the rule that no laches can be imputed until the minds of the appellees were disabused of the truth of this assertion, and that the trustees had been guilty of buying it at an under price.

THE CESTUI QUE TRUSTS HAD A RIGHT TO REPOSE IN THE HONOR OF THE TRUSTEES.

The theory of the defence is that these *cestui que trusts* are guilty of laches in not investigating and discovering these frauds.

They assert in their answers and attempt to prove in their evidence there was no fraud, and although asserting this innocency, they claim negligence for not finding out what they say did not exist.

The law is that the office of trustee is an important one—an office of trust and confidence; one in which the weak and incompetent may find shelter and protection. It is the duty of the trustee to execute the trust, and it is not the duty of the *cestui que trust* to make any inquiries. 22 Beavean, 325; affirmed in *Thompson* vs. *Finch*, 8 De Gex; *Macnaghten* vs. *Gordon*, 560. Same principle: 8 How., 200–201; 93 U. S. R., 93; 117 U. S. R., 185; 4 Desaussure, 697; 12 How., 131; 12 Wall., 340; 94 U. S. R., 512; 21 Geo., 558; 4 How., 295; 4 Bradw. (Ills.), 473.

The effect of all this testimony introduced by the appellants instead of establishing knowledge and acquiescence, proves ignorance; and, therefore, no acquiescence as a matter of law can follow. It proves actual hinderance and impediment, caused by the frauds and concealment of the trustees. For, in the language of all of these favorable witnesses for the defence, there was no suspicion that the sale had not been managed in the best manner for the heirs. Is not, we confidently submit, this evidence unanswerable to exculpate the appellees of all delay and negligence in discovering these frauds? Why should they not take the words of these trustees, that the property brought its full price? Why should not these appellees, who were children, as the witness swears, to these two men, place trust and confidence in them, as, indeed, the law of trusts says they may do? Perry on Trusts, § 178; 4 Ed., and cases cited in notes 1, 2, 3, and 4.

DEATH OF TRUSTEES NO INJURY TO DEFENCE.

Unfortunately for these appellees, and fortunately for the appellants, these frauds were not discovered until death had claimed both of these trustees. If they, or either of them, had been alive, not a shadow of defence would be left them—not for a moment could they have withstood this investigation of their conduct, and it has therefore been of the highest importance for the appellees to prove the frauds from evidence of that character which it would be impossible for them to alter, even if they were alive and stood in the witness-box.

These trustees, if alive, could not alter the fact which has been proved, that they, as early as 1859, knew the value of subdivisions of land in obtaining the best prices; for their own recorded subdivision of square 110 into 52 lots, signed on the public records with their own proper hands, demonstrates it beyond the power of their personal oath to disprove it.

These trustees, if alive, could not disprove that they continued in the belief of the value of subdivisions down to the date of the sale in 1864, because they continued down to that date to sell in subdivisions, as their numerous deeds of record and proved in evidence demonstrate beyond the power of their corporal oaths to disprove,

These trustees, if alive, could not disprove that they employed James Chapman as their agent to buy these squares for them at their own public sale; that his name was announced as the purchaser, and not theirs; and that his name was recorded in the book of sales by the auctioneer as such purchaser, because the book and record of sales have been produced in evidence, and shows the fact beyond contradiction.

These trustees, if alive, could not disprove that they exposed, for public sale, squares 95 and 96 together as an entirety, and that they bought them at 4 cents a foot, without having first endeavored to get bids for these squares, either separately or in lots; they could not disprove that these squares contained 4⅓ acres of land, situated within the limits of Washington City, between Massachusetts avenue and O street on the north and south, and 20 and 21st streets on the east and west, and that these squares were appropriately subdivided on the original maps of Washington into building lots; for all these things are proved by the record of the sales and public plats of Washington.

These trustees, if alive, could not disprove that, immediately after the sale of these squares 95 and 96, they offered in lots square 94; that square 94 adjoins 95; that they were all outlying property on the same elevation and slope of land; for all these things are proved also by the record of the sales and the public grades of Washington.

These trustees, if alive, could not disprove that when they offered square 94 in lots and separately, that the average price the lots brought was 12½ cents a square foot; and that the loss to the appellees was $15,930.87, in the sale of squares 95 and 96, if they had brought the same price; for these facts are proved by the record of sales, their own returns and settlements, and a simple arithmetical calculation.

These trustees, if alive, could not disprove that they next offered square 111 as a whole, an entirety, and that the same James Chapman became the purchaser for them; for the record of the sales and their own deeds prove it beyond dispute.

These trustees, if alive, could not disprove that they next offered the remaining 19 unsold lots, in square 110, separately to the public, and that so sold they brought on an average 8⅓ cents a square foot; for this is proved by the record of sales, and their own official returns.

These trustees, if alive, could not disprove that square 110 was, at that time, low land, below grade, farther out towards Boundary street, immediately adjoining Holmead's burial ground; that square 111 was slightly above grade, nearer the business part of Washington, and that it had on it a substantial 2-story and attic brick building, with a 2-story brick kitchen occupied by them, and 18 persons, exclusive of servants, 16 of whom were nearly adults; for these facts are proved by the public records and the admitted facts that such a building did then, and does now, still exist on the square.

These trustees, if alive, could not disprove, notwithstanding this disparity in value of these two squares, notwithstanding the improvement which one possessed, and the other did not; yet the one with these advantages, namely, square 111, bought by the trustee, brought only 9 cents including improvements, while the low lying square, when sold in lots, averaged $8\frac{1}{3}$ cents, and that some of the lots brought 10 and 11 cents per square foot; for these facts are proved by the record of the sales, and their own deeds to the purchasers.

These trustees, if alive, could not disprove that they made their deeds to Chapman as executors and trustees; and that Chapman then reconveyed to them, reciting in the deeds to them, as individuals, the false sums of $10,842.14 and $9,093.42 respectively, for the deeds of record prove it. These trustees, if alive, could not disprove that they retained these deeds made on May 20th, 1864, until November 18th, 1864, before they recorded them; for the deeds themselves prove it. These trustees, if alive, could not disprove that after they came into possession of these squares, they subdivided them for themselves and sold only in subdivisions, for the official records have proved it.

Each and all of these facts are beyond the slightest contradiction, and on these alone we claim that a court of equity can not escape, indeed it will not seek to escape, but take pleasure in, setting aside the sales, so far as the property is still held by the heirs and volunteers of these trustees. We rest the case of the appellees on these facts, beyond the power of the trustees, if alive, to disprove in the slightest degree. The appellants, therefore, are not prejudiced or damaged or injured in the slightest degree by the deaths of their ancestors.

The frauds perpetrated are not hallowed by their deaths; the injury done their *cestuis que trust* is not wiped away because of their being called, it may be, to account the sooner at another bar. The earthly law does not offer the premium of immunity because the fraud was so secretly and cunningly devised as to withstand investigation until after the perpetrator's death. Rather, it says, the deeper laid the plot, the blacker the offence.

If any injury is done in this case by the death of these men, the appellees are the sufferers, and not the appellants.

In *Morse* v. *Royal*, 12 Ves., 374, Lord Eldon said that the effect of the death of a defendant was not to deprive the plaintiff of his right, but was a question only of *evidence*. See also *Charter* vs. *Trevelyan*, 8 Jur., 1015; 11 Cl. and Fin., 714; and cases cited § 923, Perry on Tr., 4 ed.

CONSENT TO THE SALE.

It is seen by the tenor of the leading questions propounded by the counsel for appellants to the witnesses (relatives) of the appellants that they have sought to prove a consent by these girls and women, appellees to these purchases, by the trustees. Mrs. Sarah E. Hopkins, George Washington Hopkins, and Mrs. Lilburn, not being residents of the family of George W. Hopkins, trustee, and therefore not included within the range of the testimony of Mrs. Dashiell, Miss Dashiell, or Miss Adeline Hopkins.

But even assuming, for the purposes of the argument, that their testimony is true, that they informed the family that "they intended to buy and would give as much as any one else," is this such a consent as the law contemplates such to be given by a *cestui que trust?* Clearly not. They were merely passive, and such inaction is not consent, as expressly decided by the Supreme Court of Pennsylvania in the case of *Paul* vs. *Squibb*, 12 Pa., 297. Lewin on Trusts, page 450, confirmation must be a solemn and deliberate act; no *suggestio falsi*, no *suppressio veri.* And *Carpenter* vs. *Heriot*, 1 Eden, 338, not fished out from loose expressions.

McCarthy vs. *Decaix*, 11 English Ch., 6, 13. In *Hallett* vs. *Collins*, 10 How., 174, a release was set aside made by one just come of age, ignorant of the value of the land, and the nature of his title, in favor of one in possession with knowledge for an inadequate consideration.

In *Owings* vs. *Hall*, 9 Pet., 629, it is said there must be no fraud, and full knowledge of all material facts.

> *Perry on Trusts*, § 923 (4 ed.) and § 850 (4 ed.), p. 501, and cases cited in notes 1, 2, 3, and 4; also cases cited in note 1, § 851, p. 502 (4 ed.).

"There may be such relations between the parties that silence, or the non-disclosure of a material fact, will be fraudulent concealment. If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee."

Testimony of Appellees as to Knowledge and Acquiescence.

Every appellee was put on the stand, that they might be subjected to the closest cross-examination.

Mrs. Emeline V. Lilburn, page 393:

Q. Prior to the sale, and after you arrived in Washington, had you been consulted by your uncle George or brother John, in regard to the manner in which the property should be sold, and if so, please state what that consultation was?

[Objected to as irrelevant.]

A. Not that I remember of.

Q. Prior to the sale, had any information been given to you, or were you informed by any one that either your uncle George W. Hopkins, or John S. Hopkins, intended to become purchasers at the sale; and if so, what was that information that you received?

[Objected as leading, irrelevant, and inadmissible.]

A. I never heard anything of it. (394.)

Q. How far did George W. Hopkins, your uncle, or John S. Hopkins, consult you in regard to the sale?

A. They never consulted me.

[Same objection.]

Q. Had you any information at the time of the sale, or prior to it, that they were to buy the brick business and to carry it on; and if so, please state fully what that information was?

[Same objection.]

A. No, sir. Etc.

Q. What information had you at the time of the sale, or prior thereto, that your uncle George intended to become a purchaser of the premises where he resided?

[Same objections.]

A. I never heard anything of it.

Q. What consent have you given to either your uncle George or brother John becoming purchasers at the sale that they made as trustees and executors under your father's will?

[Same objection.]

A. None.

Q. Have you any knowledge of their having bought this property on their own behalf; and if so, please state what it is?

A. I have no knowledge.

Q. How was the property sold in regard to subdivisions or squares, of your own knowledge?

A. I do not know how it was sold.

Q. Do you know what prices were obtained for the property?

A. I do not, excepting the house.

Q. What was the price the house brought?

A. Nine cents. (395.)

Q. How do you know that?

A. I heard the bids.

Q. After the sale was over, had you any conversation with your uncle George W. Hopkins in regard to the sale; and if so, please state what it was?

A. I had.

[Same objection.]

Q. What was it?

A. I went down to the room after he came in from the sale. I remarked to him, "Uncle George, is the land all sold?" He said "Yes." I said, "You did not get but very little for it." He said, "No, it was a *bona fide* sale."

Q. Who was present at this conversation?

A. No one that I remember of.

Q. What day was this?

A. The same day of the sale.

Q. What information did he give you in that conversation as to his becoming a purchaser?

A. That was all that was said.

Q. What influence did that have on your mind?

[Objected to.]

A. No influence at all, because I had confidence in him. I thought it was all right, because he told me so.

Q. Why?

A. Because I had perfect confidence in Uncle George; as much so as my father; and when he told me it was all right I believed him as much as I would my father.

The next witness for the appellees was Mrs. Elizabeth A. Early, and she proves, also, only what the defence proved, the belief of every one that the sales were honest, page 443.

Q. Do you remember of a sale that took place of the real estate that your father was interested in, in May, 1864?

A. I do.

Q. Were you present on the day of sale?

A. I was.

Q. Where were you?

A. Up in Uncle George's room.

Q. What were you doing?

A. I do not remember what I was doing.

Q. I have reference to your observation of the sale?

A. I felt very miserable over it.

Q. Had you been consulted prior to that time in any manner in regard to the sale by anyone; and if so, by whom?

A. I have no recollection of being consulted at all about it.

Q. Did you know that the sale was going to come off that day; and if so, how?

A. I saw it in the papers.

Q. How long before?

A. I am not sure; perhaps a week.

Q. Had it been stated by anyone in your presence as to who were to be the purchasers of the property; and if so, whom, before or after the sale took place?

A, No, sir; I never heard anything about it before the sale.

Q. What urgency had you made in regard to having the sale come off?

A. None whatever.

Q. Did you hear anything after the day of the sale as to who had become the purchaser of the property?

A. Yes, sir; I heard that a brick-layer had purchased it.

Q. Did you hear his name?

A. I did not that day.

Q. Do you remember subsequently, or do you remember of George W. Hopkins and John S. Hopkins subsequently becoming the owners of the property; and if so, what about that?

A. I saw them continue together every day to the brick-yard, and some one said they had bought it.

Q. Did they say from whom they had bought it?

A. From a man by the name of Chapman.

Q. Did you then say anything about this sale of your uncle George and brother John?

A. No, sir; I never had a conversation.

Q. Why did you not?

A. Because I had implicit confidence in Uncle George, and thought everything was right.

Q. To what extent, if any, were your suspicions aroused as to the invalidity of this sale at that time?

A. I had no suspicions whatever.

Q. What conversations have you had with your uncle George or brother John in regard to the sale?

A. I never had any.

Q. What was the knowledge as to the power of your uncle George and brother John S. Hopkins under the will of your father?

A. I always understood they had absolute power.

Q. Who did you hear that from?

A. I do not remember now.

Q. Did you know at that time anything about a trustee not being competent to buy at his own sale, and if so, what was your knowledge on the subject?

A. No, sir; I did not. Etc. (444.) See further.

Q. How were you treated in regard to consultations, in regard to business matters, by your uncle George and brother John? (444.)

A. They were always very reticent.

Q. How did they estimate you, if you have any knowledge?

A. They said they did not think ladies had any business knowing anything about business.

Another witness introduced was Mrs. Alice C. Hall. At the time of the sale Alice C. Hopkins, a young girl, just then 18 years of age. The idea that a young lady should have agreed and acquiesced in such a sale as this, so as to enable trustees to have bought at their own sales, at a grossly inadequate price, is simply ridiculous. She was put upon the stand, testified to her ignorance of the whole matter, and her confidence in her uncle and brother, and corroborated in every essential by the older witnesses for the defence. Page 466.

Q. What knowledge had you that the sale was going to take place?

A. None at all.

Another witness and appellee was Mrs. Mary Victoria Wailes. She was, in 1864, a young lady about 24 years of age. Her testimony is unsullied, and her cross-examination gave brilliancy to the frankness and candor of her truthfulness throughout. The following gives the substance of her testimony. (495.)

Q. Did you live at the house of your uncle George in the year 1864?

A. Yes, sir.

Q. Do you remember the sale of the real estate in which your father had an interest, in May, 1864, when it was sold by your uncle, George A. Hopkins, and brother, John S. Hopkins? (496.)

A. I cannot remember the day distinctly, and I cannot remember whether I was there or not. Etc.

Q. Did you have any actual notice, and if so, what—that the sale was to come off when it did? Did you have any preceding knowledge before the sale took place?

A. I do not remember at all. I cannot remember whether I knew of it or not; but I knew it was to take place on account of Alice being of age. Etc.

Q. Did you ever hear that a sale had taken place, and if so, when?

A. I cannot tell when; but I remember hearing that the sale had taken place.

Q. What did you hear about the sale?

A. I heard that the property was sold to a bricklayer.

Q. Did you hear his name at that time?

A. No, sir.

Q. Where did you get this information—from talk in the family of George W. Hopkins?

A. We did not talk about property at all, but I may have heard it in that way; I do not remember.

Q. You say you did not talk about property at all? I will ask you to state more fully what you mean by that?

A. Property was never discussed in the family. * * * (502.)

Q. Did you ever investigate these settlements?

A. No, sir.

Q. Why not?

A. Because I had perfect confidence in my uncle.

EFFECT OF THE RELATIONSHIP WHICH EXISTED BETWEEN THE PARTIES.

It will be borne in mind that Mrs. Eliza Dashiell, and other witnesses for the defence, testified that George W. Hopkins was looked up to as the head of the family by these *cestuis que trust;* that it was one united family; no suspicion, no mistrust existed; that the word of these trustees was the law for all. Under such circumstances can these appellees be quarreled with by the appellants for not having mistrusted their ancestors, when they themselves affirm they were worthy of all confidence? No laches can be claimed in cases of such relationship—no acquiescence or ratification of illegal or unlawful acts, spelt out by the most equivocal and uncertain testimony of more equivocal and uncertain acts testified to.

Kennedy vs. *Kennedy*, 2 Ala., 607.

"There can be no doubt but the undue exercise of an influence resulting from confidence and friendship exerts great potency upon an application to equity to rescind a contract. The doctrine being, says Mr. Justice Story, that whatever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he shall not be permitted to hold any such advantage."

Boney vs. *Hollingsworth*, 23 Ala., 690.

"Courts of equity grant relief against conveyances obtained by misrepresentation or mistake; and if the parties occupy a relation from which an unusual degree of confidence, affection, or sense of duty naturally springs, the utmost good faith is required from the party in whom the trust is reposed, and he must show that his contract is in every respect just, fair, and equitable. This was applied between brothers and sisters, and a deed from the latter to the former set aside."

Sears vs. *Shafer*, 2 Seld.
Welburn vs. *Rogers*, 24 Geo., 558.

A court of equity will set aside a deed obtained by persons standing in such relation to the grantor as to give them a controlling or very strong influence over the conduct of such a grantor, upon slight evidence of the improper exercise of such influence. Applied between brother and sister.

Doctrine applied again in *Hewitt* vs. *Crane*, 2 Halstead Ch. (New Jer.) R., 173, between brothers and sisters. In this case acquiescence and lapse of more than six years were relied on in defence without avail.

Perry on Trusts, § 210.

Michon vs. *Girod*, 4 How., 560. Case between relatives, relief given after more than twenty years.

Brooks vs. *Martin*, 2 Wall, 82.

If the parties are to be regarded in this transaction as holding towards each other no different relations from those which ordinarily attend buyer and seller, and as therefore under no special obligation to deal conscientiously with each other, we are satisfied that no such fraud is proved as would justify a court in setting aside an executed contract. But there are relations of trust and confidence which one man may occupy towards another, either personally or in regard to the particular property which is the subject of the contract, which impose upon him a special and peculiar obligation to deal with the other person towards whom he stands so related, with a candor, a fairness, and a refusal to avail himself of any advantage of superior information or other favorable circumstance, not required by courts of justice in the usual business transactions of life.

DISSIPATED HABITS OF WILLIAM M. S. HOPKINS, ISAAC H. HOPKINS, AND GEORGE WASHINGTON HOPKINS, ARE IN EQUITY NOT THE SUBJECT OF PUNISHMENT, BUT OF PROTECTION.

Cruise vs. *Christopher*, 5 Dana, 182, Judge Marshall:

"First, in relation to the first of these grounds, we are of opinion that, although Christopher was not actually incompetent, he was reduced, by long habits of intoxication, to a state of mental imbecility bordering on actual incapacity; he was in such a condition, even when sober, as required of those who might be contracting with him that they should be scrupulously regardful of his interest, and such as awakens the peculiar vigilance of the chancellor in detecting any circumstance of inequality or imposition."

DELAY IN SETTLEMENT BY THE TRUSTEES UNTIL THE WAR WAS OVER.

We have thus far traced the conduct of these trustees down to the time when they were compelled by law to record their deeds, or be exposed to the rights of innocent *bona fide* purchasers from Chapman. Although they were in possession of the property they had bought, and were carrying on the business, and three of the *cestuis que trust*, namely, Mrs. Lilburn, George Washington Hopkins, and Sarah E. Hopkins, assignee of William M. S. Hopkins, were none of them supported out of the estate, no settlement or division of the proceeds of the estate was made by them.

Since 1859 an unsettled account of their administration had been lying dormant in the Orphans' Court. They had in that year taken out letters testamentary, made a return of a little household furniture of the deceased John Hopkins, and had done nothing further. Just at that time the judge of the Orphans' Court was issuing subpœnas to compel all these delinquent personal representatives to come into court to settle their estates; and we find by the evidence that these two trustees, in the year 1864 and 1865, were constantly ruled by the court to settle their accounts. Accordingly, the 13th of September, 1864, was fixed as the day when they should settle their accounts as executors (see page 1219), and advertisement was made of this date. The 13th September, 1864, arrived, and nothing was done; no return had been made, no supplemental inventory or account had been filed, and the matter was not even called to the attention of the court; nor was any postponement or adjournment ordered. This is all proved by the examination of the records of the Orphans' Court. (Pages 1219–1220.) Again and again these trustees were cited after this date, and it was only after the war was practically closed, and the security of the Union and the National Capital were assured, that these men were willing to pay their money. They took no chances. If the war had been adverse to the cause of the Union, and the property had depreciated in value, it was an easy matter for them to claim that they had bought the property in for the heirs, and theirs must be the loss. After they had paid the purchase money, it would then be too late. If such was not the case, why, we ask, did they wait from the 10th of May, 1864, until the 29th March, 1865, ten months and a half, before they made any return to these heirs, who were, as the defendants claim, anxious for a sale and settlement of their rights. The outside or stranger purchasers at the sale had paid $3,340 of the purchase money, and by the terms of the advertisement of the sale, one-third cash, and balance in six and twelve months, they were chargeable themselves with interest on their purchases, but so far as it appears, they never paid one dollar on that account, or on account of the $3,000 they had received as the cash payment from strangers. They waited, we say, purposely until they were certain they had made no mistake as to the future prosperity of Washington City—took no chances of loss, and when the National Government was successful, then, and only then, came forward with their account and money. That such was the state of the war at their date of the settlement is shown by the following testimony of Mr. J. Carter Marbury, at page 327:

Q. Please state if you have made a copy of the headlines of any of those papers of the progress of the civil war at that time, existing between the Northern and Southern States of the Union; if so, from what paper they were copied?

A. I did make copies of the headlines from the *National Republican.*

Q. Have you that paper with you?
A. I have.

[Mr. PHILLIPS here introduces paper in evidence which is marked Exhibit 2.] [1265.]

Exhibit No. 2.

Copy headlines taken from *National Republican*, a newspaper published in the city of Washington, of dates, as follows:

TUESDAY, *Feb.* 14, 1865.—Sherman across the Edisto.—Branchville undoubtedly fallen.—The Peace party in Richmond.—The hungry families in Richmond.—The desperate condition of the rebellion in Richmond.

MONDAY, *Feb.* 20, 1865.—Startling news.—Charleston evacuated.—The National Ensign flying over the hot-bed of secession.

TUESDAY, *Feb.* 21, 1865.—Charleston on Fire.—Terrible explosion and loss of life.—Rebel iron-clads blown up.—The Union flag flying over Fort Sumpter.

MONDAY, *March* 6, 1865.—Richmond the last ditch.—Capture of Early and his entire command.

SATURDAY, *March* 18, 1865.—Extraordinary message from Jeff Davis.—The last four months.—The rebellion environed with perils.—He says Richmond is in greater danger than ever.—He needs men and supplies.

MONDAY, *March* 20, 1865.—He solicits an interview with Gen. Grant.

MONDAY, *March* 27, 1865.—Great battle between Lee and Grant on Sunday.—Engagement along our line.

From *National Intelligencer*, a newspaper published in Washington, D. C.:

April 4, 1865.—Announcement of the fall of Richmond on the 3d, and evacuation of Petersburg.

April 10, 1865.—Announcement of the surrender of Lee.

Thus, and thus only, within twelve days of the final surrender of the enemy, did these men commit themselves finally to their purchase, and when the integrity of the Union was assured, the future prosperity of Washington as a seat of government of a united people was certain, and consequently there could be no mistake that the squares they bought would enhance in value as they always expected.

SETTLEMENT OF THE EXECUTORS' ACCOUNTS IN ORPHANS' COURT.

Finally, on the 28th March, 1865, these trustees presented to the Orphans' Court an *ex parte* account, a first and final account of their executorship; and on the same day, without notice to any one, as conclusively shown by the evidence, pages 1219, 1220, had the same passed by the Orphans' Court, and on the same day, and without notice to anyone, had an order of distribution passed assigning to each one of these *cestui que trusts* the sum of $2,667.60¾, as the full sum they were entitled to from all their father's estate.

In this account (see Exhibit Hopkins, No. 8) filed with the original bill, they charged themselves, first, with the sale of the furniture of John Hopkins, then with the proceeds of a life insurance, then with certain moneys received from the U. S. Government for the liberation of slaves, and then followed the following item:

> "And with this amount, being one-half the earnings of firm of J. & G. W. Hopkins conducting the brick kiln owned in part by deceased, from the day of his death to date of rendering this account, first deducting the expenses of the family of deceased, and other expenses directed by the will of said deceased to be defrayed out of said earnings; and also the value of deceased's interest in said firm as per affidavit filed with vouchers, $14,952.66."

Unfortunately, for the sake of justice, this affidavit and these vouchers, after the most thorough search, cannot be found, and the case must stand upon the entry of this recorded account as above given.

It will be noticed by this entry that two items were intended to be included:

1st. One-half the earnings of the brick business from the day of his death to the date of rendering this account; and,

2d. The value of deceased's interest in said firm.

These two items aggregating $14,952.66.

From this statement it appears that there were earnings from the brick business, and not losses, and that these earnings, added to the interest of the deceased in the firm amounted, both together, to $14,952.66. How much the one amounted to, and how much the other, is nowhere shown in the testimony, although the appellees, on pages 989 of appellants' testimony, distinctly traced the possession of the book of the executors containing their account of the estate of John Hopkins, deceased, into the hands of Bertha Hopkins, administratrix of John S. Hopkins, trustee and ex.; said Bertha being a principal appellant in this suit.

This book is now in their possession, and its contents wilfully withheld, we say, from the eye of the court.

FRAUD IN SETTLEMENT OF $3,741.70.

But, assuming the most favorable aspect that the nature of the above entry will allow, that the earnings of the firm of J. & G. W. Hopkins were all consumed in the support of the family of the deceased, yet there was the real estate left.

The trustees were, by the terms of the will, to reinvest any proceeds of sale from real estate, and it was only the earnings of the brick business which was to be used in the support of his family. Only half of the sons and daughters were to be supported, and all were equal as to the real estate.

In the absence of any account by the appellants as to the earnings of the brick business, when they have the book in their possession containing the account; and in face of the fact that the will prohibits the use of the proceeds of the real estate, except for reinvestment and final equal distribution among all the heirs, we cannot presume that any of the proceeds of the real estate was consumed in the support of the family, but must take it, as the executors themselves said in their report, that they were making a return of one-half deceased interest in the firm. Now, according to the allegations of the bill and admissions of the answer, the firm was composed of John and George W. Hopkins, as equal partners, and their property consisted of squares 94, 95, 96, 110, and 111, and their appurtenances and improvements.

In 1859, these trustees entered the subdivision of square 110, and under their power of sale in the will began, in 1862, the sale of lots in that square and continued until the final public sale of May 10th, 1864. Their own deeds will show the sales made by them and the prices received for each lot and squares.

Exhibit W. A. W.

(Page 344.)

Lot.	Square.	Purchaser.	Price.
1,	110	C. Miller	$189 00
2, 3,	" "	J. M. Schade	975 00
4,	"	J. Raferty	100 00
5,	"	J. Rider	100 00
6,	"		500 00
7,	"	J. Sibley	270 00
8,	"	J. L. Roche	231 00
9,	"		462 00
9,	"	J. Grawler	210 00
10, 11,	" "	John Silbey	262 00
11,	"	John F. Goldbach	575 00
12, 13, 14, 15,	"	John F. Goldbach	1,182 25
16,	"	Jas. Chapman	251 39
17,	"	"	251 39
18,	"	"	251 39
19,	"	"	251 39
20,	"	"	251 39
21,	"	"	251 39
22,	"	"	247 14
23,	"	Ad. Kneiss	180 00
24,	"	J. Gawler	180 00
25,	"	A. McKeim	180 00
26'	"	A. Spat	180 00
27'	"	J. Spat	180 00
28'	"	J. Spates	100 00
29'	"	E. Spates	103 15
30'	"	L. L. James	103 15
31' 32'	"	"	200 00
33' 34' 35'	"	A. Iserell	300 00
36'	"	J. Gawler	290 00
37'		"	290 00
38'		"	315 00
39'		"	315 00
40'	"	J. Lydon	148 00
41'		Longstreth	192 24
42'		"	192 24
43'		"	192 24
44'		"	192 24
45'	"	P. O. Day	375 00
46' 47,	"	A. Raftery	295 00
48,	"	M. Welsh	120 00
49,		"	100 00
50, 51, 52,	"	C. Miller	315 00
			$11,377 99

Total admitted by deeds of trustees to have been received by them from sale of lots in square 110.

(See account of Auctioneers' sale.)

Square 94	$5,296 23
" 95 and 96	7,496 88
" 110	11,377 99
" 111	9,093 23
Personal property, horses, and carts	382 50
	$33,647 02

Being total shown by defendants' account of sales of May 10, 1864.

These men in their *ex parte* account to the Orphans' Court, return value of deceased interest in said firm as $14,952.66.

The deceased interest was one-half this sum, therefore multiplied by 2 gives their return of what they received:

$14, 952 66
2
29, 905 32

Money actually shown to have been received by them:

From sales - - - - - - - - -	$33, 647 02
Their return - - - - - - - -	29, 905 32
	3, 741 70
Showing a default of - - - - - -	3, 742 70

of which the appellees were entitled to one-half, or $1,875.85.

In addition to taking advantage of their *cestui que trusts* to the extent of one-half the loss of squares—

95 and 96,	$15, 930 87 - -	$7, 965 43
Loss of square 111,	6, 000 00 - -	3, 000 00
		10, 965 43

They thus are shown to have been selling, 1862 through 1864, these lots in square 110, from which they received on their own showing $3,741.70 more than they accounted for, and one-half of which belonged to the appellees, viz: $1,875.85.

We have thus far traced these trustees to their account of sales on March 28, 1865, and shown by their own deeds that up to that period they had defrauded these unsuspecting, confiding, and incompetent appellees out of, on—

Squares 95 and 96 - - - - - - -	$7,965 43
" 111 - - - - - - - - -	3,000 00
" 110 - - - - - - - - - -	1,875 85
	12,841 28

an amount nearly equal to the $14,952.66, which was their patrimony in the real estate—in other words, *one-half*. But the whole story is not yet told. Farther on the Court will find, when the subject is reached, in its chronological order, that in 1873, these appellees were again defrauded with the barest-faced conduct, and for which not one word of excuse in explanation has been offered.

SETTLEMENT IN ORPHANS' COURT NO ESTOPPEL.

This settlement in the Orphans' Court constitutes no estoppel against this suit, for the following reasons:

1st. The Orphans' Court had no jurisdiction over the real estate, or equitable assets, or the enforcement of the trusts.

2d. The settlement was entirely *ex parte*, and without notice, either actual or constructive, to any one of the appellees.

3d. There is fraud in the settlement just discovered, which, after the final adjournment of the court for the term at which it was committed, cannot be corrected in that court, but only in a court of equity.

4th. The administration of trusts, the prevention, and correction of frauds, is the peculiar provience of a court of equity.

This subject was not relied on in the court below by the appellants, and not allowed by the justice to be argued by the plaintiffs' counsel, because there could be no question that the Orphans' Court had jurisdiction.

1st. It can be demonstrated, if needed, by the decisions in *Robertson* vs. *Pickrell*, 109 U. S., 608; *Connor* vs. *Ogle*, 4 Maryland Ch. R., 425; *Scott* vs. *Burch*, 6 H. & J., 79, and by the amendment of the testamentary law of Maryland passed 1831, *Dent* vs. *Maddox*, 4 Md. R., 530; *Cornish* vs. *Wilson*, 6 Gill, 299; *Morsell* vs. *First Nat. Bank*, 91 U. S., 361; that the Orphans' Court had no jurisdiction over the distribution of equitable assets or real estate.

2d. It can be demonstrated that the interest of John Hopkins in these squares of ground was real estate, by reference to American edition of Smith & Tudor's leading cases in equity, in these words:

"That as between the personal representatives and heirs at law of the deceased partner, his share of the surplus of the real estate which remains after paying the debts of the partnership, as between themselves, is to be considered and treated as real estate."

It was not only real estate, but equitable assets shown by similar decisions in *Lewin* vs. *Okeley*, 2 Atk., 50; 7 Ves., 319; 8 Ves., 26; 1 Brown C. C., 122; 2 Brown C. C., 78; 4 Johns Ch., 651; and the exactly similar case of Aston's State, 5 Whart., 228; 5 Pet., 167.

Chancery has sole jurisdiction of equitable assets. 1 Barn. & Cress., 156; and the celebrated case in 9 Barn. & Cress., 489, affirmed in Maryland, 10 Gill & Johns., 27; 7 Harris & John., 139; 4 Hurlstone & Norman, Exch. 94.

2D. THE SETTLEMENT OF THESE TRUSTEES WAS EX PARTE AND WITHOUT NOTICE ACTUAL OR CONSTRUCTIVE TO ANY ONE.

As a matter of fact the most abundant evidence was offered to show that this settlement was entirely *ex parte*. There is no contest that it was anything else. No evidence whatever being introduced to show any notice to any one of the plaintiffs.

Sub. chap. XIV, sec. 12, act of Maryland of 1798, chap. 101, provides: 12. Any executor or administrator shall be entitled to appoint a meeting of creditors, or of persons entitled to distributive shares or legacies, or a residue, on some day by the court approved, and passage of claims; payment, or distribution may be there made, under the court's direction and control.

The meaning of this section has been expounded, *Connor* vs. *Ogle*, 4 Md., Ch. Rep. 425, and where it is shown that in order to avail themselves of it, in regard to legal assets, executors or administrators must conform to its provisions—and if no meeting is appointed of persons entitled to distributive shares or legacies, such distributees are not bound by the settlement. This is in conformity to the well-settled rule of law that no one can be bound without notice. That no such meeting as contemplated by the 14th subsection, article 12, was made in this case is apparent from the evidence at pages 326, 1,219 and 1,264. A witness examined all the newspapers of Washington from May, 1864, to April, 1865, the pretended settlement being made March 28, 1865, and found but one notice which set

September 13th, 1864, as the date of the settlement—the files and records of the Orphans' Court were produced, (page 1,219) and by them it was shown that no proceedings were taken on that day. No postponement, no notice of the advertisement—an entire lapse of the public notice.

It thus appears that on the day, 13th Sept., 1864, the executors gave notice of settlement and distribution. They themselves did not appear in court, and there being no postponement, or steps taken, the notice expired and fell. This is also proved circumstantially, because the executors were constantly notified by the court, subsequent to the above date, to come into court with their accounts, and it was only on the 28th March, 1865, that they finally did come into court. On this day they filed their account, being their first and final account, had it passed the same day that it was filed, and at the same time had an order of distribution passed. On this account, settlement and order of distribution, all on one day, *uno flatu*, these executors settled with the appellees. No meeting, as contemplated by the above statute, having been set for that day, although in the order passed it was recited that due notice had been given. This allegation the appellees have disproved, and the appellants, knowing that the only notice ever given was the one of 13th Sept., 1864, have not attempted to rebut the case made by the appellees.

In addition to the above evidence, each and every appellee has been interrogated as to whether any notice of the settlement was ever served on them. They all deny such notice.

It thus appears that these executors made their settlement and obtained their order of distribution in silence. Four of the heirs were living under the same roof with them. For days previously to 28th March, 1865, these two men were at work on these accounts at their office, and they would return to their meals and say not a word to their *cestuis que trust* of what they were doing, or expected to do. On the 28th March they ate their breakfast, sat side by side with some of the appellees, and looked others of them in the face, as they broke bread together, and never intimated that as soon as they should finish they were going to the court to have a settlement of their account and distribution made—an information it was only fair the appellees should have—but silently and fraudulently, we say, departed on their errand to consummate their frauds.

Silence in such a case is equivalent to the utterance of falsehood. It was the *suppressio veri*, in the fullest sense of the law.

RECEIPT OF THE DISTRIBUTIVE SHARE ALLOWED BY THE SETTLEMENT NO ESTOPPEL.

The solicitors of the appellants, anxious by any means to avoid an investigation of the frauds charged in the bills, set up in their answers that the receipt by the plaintiffs of $2,666, allowed by the settlement, was an estoppel against them setting up the frauds charged.

The counsel have entirely misunderstood the law of estoppel. In the first place, an estoppel can never arise in favor of a party who has committed a fraud, so as to allow himself to shield his fraud. Fraud is never barred by an estoppel. Nothing will purge a transaction of fraud but restitution.

Secondly, an estoppel does not arise against a party ignorant of his rights in favor of a party who has kept the former in ignorance.

Thirdly, an estoppel does not arise in favor of a party, unless it would be an injustice or injury to him to allow the contrary to prevail. He must have done some act or about to suffer some injury in consequence of the conduct of the other party. The receipt of $2,666.67 by each of these appellees when, if the allegations of this bill are true, they were each entitled to $5,000, does not present any case of injury to the trustees. They owed, at all events, the $2,666.67, which they paid, and are not damaged by its receipt by the appellees. This exact case was presented in a recent decision by the Supreme Court, where the idea of estoppel was repudiated.

> *Embry* vs. *Palmer*, 107. U. S., 8; also § 923 2 Perry on Trusts (4 ed.), and cases in notes 1, 2, 3, 4, 5:

"A suggestion is made, in argument, that Embry is estopped to prosecute this writ to the reversal of the decree below, because it appears that the amount of money ordered by it, to be paid to him as a condition of relief granted, has been accepted by him. It is said that this is a release of errors. Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance, by the plaintiff in error, cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him. But in every point of view the objection is met and answered by the decision of this court in the case of the *U. S.* vs. *Dashiell*, 3 Wall., 688."

Michoud vs. *Girod*, 4 How., 558, 521–545:

The receipts or acquittances given by two of the complainants to the executors do not affect their rights. They were obviously given without full knowledge of all the circumstances connected with the disposal and management of the estate. Indeed, it is plain such information has been withheld by the executors. It is true that an account was presented to them with official signatures to it, but without vouchers of any kind to verify its correctness, and it was accompanied by a letter from Nicholas Girod, in which menaces of displeasure are being led with intimations of future kindness.

FRAUD OF $3,523.04 IN THE MIX PROPERTY.

In tracing the history of this case, we have arrived chronologically to what is known in the amended bill as the Mix property.

When the original bill in this case was filed, it was not known to the solicitors of the appellees that any fraud had been committed by these trustees in regard to this property. The bill was filed April 8th, 1884, and it was not discovered until the following November, when the solicitors of the appellees were further searching out the facts of the case found that these trustees bodily appropriated one-half of the proceeds of this property. In the discovery of these facts, the bill was amended on leave of the court, and these trustees were directly charged with fraudulently appropriating one-half of said property to their own benefit.

The evidence shows that while John and George W. Hopkins were partners in the brick-making business, yet old John Hopkins had carried on the wood and coal business on his individual account. It shows that John Hopkins failed in business, and that George W. Hopkins did not fail. If all their business had been of a partnership character, the failure must have affected each. John Hopkins also had a bank account, and transactions with the Farmers' and Mechanics' Bank of

Georgetown, in which George W. Hopkins was not interested.

When John Hopkins was taken with his last sickness he had an interview with a gentleman named Charles E. Mix. In this interview Hopkins claimed that Mix owed him some lots of ground, and Mix promised to convey them to him.

Elizabeth A. Early, page 740:

Q. Please state if there was a gentleman by the name of Mix that called to see your father (John Hopkins) shortly before his death, and, if so, what was said.

A. He did. [741.]

[Objected as irrelevant, and because declarations of Mix are not admissible.]

Q. State what conversation you heard between your father and Mr. Mix.

A. Mr. Mix had not given him a deed for some lots he had promised to give him, and he told him he would do it.

Q. What did your father ask him?

A. He told him to be sure and give him those deeds, and he said he would.

John Hopkins soon died. But on the 27th Oct., 1869, the said Charles E. Mix redeemed his promise to the dying old man, and made a conveyance of lots 3, 4, and 5, square 67, consideration $5, to "George W. Hopkins and John S. Hopkins, as trustees and executors of the will of John Hopkins," "the said property to be held by them as trustees and executors, for the uses and purposes of said will." See Exhibit D, Plaintiffs' testimony.

In this deed, received by these two men, not a word is said about any individual ownership or partnership right in George W. Hopkins, but plainly and emphatically to these two men as trustees for the trusts and purposes of John Hopkins's will.

Mr. Mix, formerly Commissioner of Indian Affairs, was a man of business, and knowing that he owed the lots to John Hopkins, it was impossible to have a conveyance from him in any other manner than what comported with the true facts.

Nor was there any chance of oversight on the part of George W. Hopkins. He was a man of affairs. He had for ten years been signing deeds, as follows: "George W. Hopkins, for himself, and George W. Hopkins as trustee and executor of John Hopkins." Probably nearly fifty times had he signed his name twice to every deed. This is all shown by Exhibit W. A. W., Abstract of Conveyances, Plaintiffs' testimony. This man well understood the difference between *meum et teum.*

These lots were held by them under their express trusts of the will of John Hopkins, until the 18th June, 1872, and on which date they conveyed them to James M. Latta for $6,784. Exhibit E, Plaintiffs' testimony, page 1273.

In this conveyance we do not find any pretense of joint ownership by George W. Hopkins, no conveyance by "George W. Hopkins, for himself, and George W. Hopkins, as executor and trustee of John Hopkins," as he had written and signed in every deed relating to all the subdivision lots of squares 94, 95, 96, 110, and 111; but it was a conveyance pure and simple by "George W. Hopkins and John S. Hopkins, executors and trustees of the estate of John Hopkins."

They sold for cash and received the $6,784 on the 18th June, 1872. This sum they retained in their hands until the 1st of July, 1873, over a year, when they rendered the following statement to the heirs. The statement to each individual.

Mrs. Early's was as follows, handwriting of John S. Hopkins, page 1280:

Sales of lots 3, 4, and 5, square 67 - - - -		$6,783 99
Balance in interest, rents, &c. - - - - -		262 10
		7,046 09
One-half to George W. Hopkins -	$3,523 04½	7,046 09
" " " J. Hopkins - - - -	3,523 04½	
	7)3,523 04½	
	503 29	

July 1st, 1873.

It thus appears that, although these men received this property expressly in trust for the heirs of John Hopkins and not otherwise, and although they conveyed as trustees of John Hopkins, and not otherwise, they unblushingly appropriated one-half of the entire proceeds to George W. Hopkins. What he did with this $3,523.04 no man can say. Whether he divided with John S. Hopkins equally, and in what proportion, no one can say. But that he must is highly probable, for this John S. Hopkins, according to the testimony of his acquaintances, loved money, and stuck close to all he got his hands on.

A show of fairness was apparently made in the trustees charging themselves with interest and rents, &c.

What they received as rents for the small house on the lots for the 12½ months they held the property, there is no evidence, but lawful interest at 6 per cent. for 12½ months alone amounted to $423, instead of $262.10.

AMOUNT OF FRAUDS.

To recapitulate the amount these unfortunate beneficiaries were defrauded of by their trustees:

Under sale of squares 95 and 96 - - - - - - -		$15,980 87
" " " " - - - - - - -		6,000 00
Default in return of square 110 - - - - - - -		3,751 70
		25,732 57
One-half of above due plaintiffs - -	$12,866 28	
Default on Mix property - - - - - -	3,523 04	
	16,389 32	

The entire amount these trustees returned as their share in their father's estate, derived from these five squares, was $14,952.66, showing, if the allegations of their bill be true, that they were cheated out of more than one-half of their inheritance.

FRAUD OF JOHN S. HOPKINS, TRUSTEE, IN SETTING UP TRUST DEED OF 1860 AS AN ABSOLUTE CONVEYANCE.

It will be remembered that William M. S. Hopkins, the brother of John S. Hopkins, executed a conveyance of all his interest in his father's estate for the alleged consideration of $3,000, page 16. This deed was executed and duly recorded on July 7th, 1860. The deed was absolute on its face. The bill, however, charged that it was only a secret trust, and the answers of the heirs filed in response thereto admitted that it was a trust, made to protect the said William against his incompetency and dissipation. The admissions of the answer of Bertha Hammond, sole heir of John S. Hopkins, are as follows, page 32:

"I admit the records show a conveyance from William M. S. Hopkins and wife to John S. Hopkins, dated 20th June, 1860, whereof 'Exhibit Hopkins, No. 2,' is a true copy, and the delivery of the original to the grantees on the 25th Jan'y 1864, &c., &c. I am informed and believe that the said deed, absolute on its face, was availed of by my father solely as a security and for the protection of his brother, the said William M. S. Hopkins, who was addicted to gross intoxication, and that the full share of the latter in the estate of his father was duly accounted for and paid to him."

On the 29th of January, 1864 (page 1262), four months before the sale of May 10th, 1864, the said William M. S. Hopkins, knowing he had not sold his interest in his father's estate, made a trust in favor of his wife and two infant children, Christopher Ingle, one of the plaintiffs, having been made trustee.

In this condition of the title, Mrs. Sarah E. Hopkins, the wife of William M. S. Hopkins, and beneficiary under said trust deed of 1864, wrote the following letter to John S. Hopkins in 1873. Let it be remarked that all this correspondence was produced by the defendants, by, in fact, the administratrix of said John S. Hopkins. See page 3791.

BALTIMORE, *Aug. 18th.*

To JOHN S. HOPKINS,
Etc., etc.:

I write to ask you when you can make me the payment from the sale of the lots. * * * I sent you the number of the record, so that you would not have any unnecessary trouble for me. * * *

S. E. HOPKINS.

This letter was sent by Sarah E. Hopkins to said John S. Hopkins, and received and produced by his administratrix on the cross-examination of Mrs. Sarah E. Hopkins.

By the terms of said letter she, as assignee and beneficiary, was calling on said John S. Hopkins for information as to her rights She informs him of her title, and where he will find it recorded.

In answer to this demand, this trustee unblushingly repudiates his trust, and sets up the conveyance by Wm. M. S. Hopkins, July 7th, 1860, as an absolute deed, and therefore a conclusive answer to her demand on him for an account and payment. The answer is in the handwriting of John S. Hopkins, was preserved by him, introduced as evidence by his administratrix, heir, and principal appellant.

It is in these words, page 380:

WASHINGTON, *Aug.* 27, 1873.

MRS. S. E. HOPKINS: Yours of the 18th inst. came duly to hand and contents noted. You will please excuse me for not answering it sooner, as Uncle George was away and I had not time. You ask me, in your letter, to make a payment on some lots that I have sold. I do not understand you. I have not sold any lots of yours, or any that you have any interest in, that I know of. And you ask me to go and look at the records. I am very sorry that you did not come on, as it seems to me you have lost sight of the deed that you and William gave me, which I have, and it was duly recorded July 7th, 1860, in Liber J. A. G., No. 200, folios 138, 139, 140, and 141, one of the Land Records for Washington County, District of Columbia, which you can see at any time.

Yours respectfully,

J. S. HOPKINS.

True copy of letter sent.

Thus we have proved in the most emphatic manner, out of the appellants' own mouths, by the handwriting of this trustee, that in 1873, when called on to account by the plaintiff, Sarah E. Hopkins, he repudiated her title, and set up the secret trust, as an absolute conveyance to himself, of her interest. And this very deed is now admitted by the administratrix, and sole heir of said John S. Hopkins, (by the person who, at this moment, has over one hundred thousand dollars of these squares in her ownership), was only a trust after all—aye, she was compelled to admit it, for the statements of account, in the books of said trustees, prove that payments were made to said Wm. M. S. Hopkins on account of the sales of May 10, 1864, and of the Mix property the same as to the other heirs. A receipt produced by the defendants may be introduced here as corroboration. (Page 1261.)

"Received of Geo. W. & J. S. Hopkins, executors and administrators on John Hopkins's estate, five hundred and three twenty-nine hundred dollars in full of all demands due me from the said estate, and also in full of any or all demands due me from the said parties above mentioned up to this date, Dec. 2, 1873.

"$503.29. W. M. S. HOPKINS."

[Page 376.] BALTIMORE, *Thursday*.

To JOHN HOPKINS, ESQ.:

I have just received your letter in which you say that you have not sold anything belonging to me. I am certainly aware of that fact, but selling that which I have no interest in I do not understand. As far as my giving you a deed I am in perfect ignorance of anything of the kind. What William did I do not know, and if I signed it, I signed it not knowing what it was (which fault was not yours), for the deed of trust in which William gives me the portion of his father's estate is duly recorded, and was January 29, 1864. I was not aware that William owed you anything, but thought it was just the opposite. I wish you would be kind enough to tell me what the debt is for, as William told me the last time I saw him that the lots were sold and I could have the payment made to me, is the reason I wrote to you. Etc., etc.

S. E. HOPKINS.

To this letter John S. Hopkins made no reply. She was baffled by this strong man. She supposed she was wrong and he was right. At all events, John S. Hopkins, if alive to-day—and being dead, his heir stands in his shoes—would be estopped to deny that the appellee, Sarah E. Hopkins, had a right to rely on the truthfulness of his own statements. And that statement was the gross fraud of setting up a secret trust received under the confidence of brotherhood, and faithful promises, as an absolute conveyance. Does not this letter, in the handwriting of John S. Hopkins, perpetuated and produced by the appellants, bring the case of this appellee, Sarah E. Hopkins, within the rule, adopted for the protection of innocent purchasers, that she is entitled to relief at any time, if she can show actual hinderance and impediment caused by the fraud of the party in possession?

Oliver vs. *Piatt*, 3 How., 404:

"Of transactions of this nature, after such a lapse of time, it is, perhaps, not easy to ascertain all the facts which then regulated the conduct of the parties when they depend upon the frail recollections of witnesses. * * * But the written statements of Baum, in the letters above cited, are evidence of his intentions and acts, of a far higher character, which the lapse of time has not obscured or varied; and those letters are, as to himself, most conclusive to show that he did not deem himself as acting for his interest alone, but for that of his associates also, in his whole proceedings to re-acquire those tracts.

PLAINTIFF, SARAH E. HOPKINS, BEING A MARRIED WOMAN, NO LACHES ARE CHARGEABLE AGAINST HER.

Page 364 shows that Mrs. Sarah E. Hopkins was married on January 5, 1854, to Mr. Wm. M. S. Hopkins, and that she is still and always has been his lawful wife, although separated since 1865, and a resident of Baltimore, Md.

In equity as well as at law married women are exempted from the responsibilities imposed upon persons *sui juris*, in analogy to the exemptions of the statutes of limitations.

This subject has been frequently passed upon. It is sufficient to cite one case to show the rule of law. It is from the Supreme Court of the U. S.

House vs. *Mullen*, 22 Wall, 45:

"The fourth ground of demurrer—that the bill shows that the claim was stale, barred by the statute, &c.—is sufficiently answered by the averment of the bill, that plaintiff, Eliza House, was a *feme covert* from the time she parted with the possession until the year 1868, the bill being filed in 1871."

CONCEALMENT OF JOHN S. HOPKINS IN REFUSAL TO ANSWER LETTER OF JOHN J. JOHNSON, ATTORNEY-AT-LAW.

This wily man, John S. Hopkins, knew when to speak and when to keep silent. Notwithstanding the conveyance by William M. S. Hopkins, on January 29, 1864, to Christopher Ingle, in trust for his wife, Sarah E. Hopkins, he was constantly wanting money himself from the estate. He was then confirmed in his dissipated habits, and to get the means to satisfy his thirst for ardent spirits, he was ready to take and appropriate to his own use what he had already given to his wife. This is but natural, and what the most honorable man would descend to, if unfortunate to become as dissipated as this man was.

He was, therefore, continually after his brother, John S. Hopkins, for money, for a settlement, and quickly spending for liquor all he got.

He consulted several lawyers, but, as is quite natural, was unable to get them to do anything for him. Among others, he sought John J. Johnson, and who, to satisfy him, wrote the following letter to John S. Hopkins. This letter is produced by the appellants, page 191:

WASHINGTON, D. C., *January* 10, 1873.

JOHN S. HOPKINS, Esq.:

SIR: Mr. William M. S. Hopkins has placed in my hands a paper executed by him to you in 1860, in which said instrument you agree to pay him so much for his estate under his father's will. He informs me that no consideration was ever paid under said conveyance; that it was done for a specific object. He has, therefore, instructed me to notify you that he desires a release from you of that conveyance, and a settlement of his father's estate, in order that he may get what is due him; and that if you decline to do so within a reasonable time, then to bring suit to cancel the deed, and to settle the estate.

Very respt.,

J. J. JOHNSON.

[With envelope.]

Q. He wrote that at your instance?

A. Yes, sir. I went to Mr. Johnson's office, below here, on Louisiana avenue, before he moved into his present office.

In answer, however, to this letter, no reply ever came, as is shown by the testimony of Mr. Johnson, at 522.

When a trustee is lawfully called upon to account, by one having an interest in the subject matter, and then remains silent when he ought to speak, justice requires that he shall not be allowed to plead laches and negligence in his interrogator. He is himself *in delicto*, appears with unclean hands, and should not be heard setting up knowledge in any other, when he himself refused it.

DISCOVERY OF THESE FRAUDS.

During all these years these female appellees rested in the belief that their uncle, George W. Hopkins, and their brother, John S. Hopkins, were honorable men. They had never unlearned the lessons inculcated in them while residents of their uncle's house; that these sales were honestly made, under the most favorable circumstances for the heirs; that the property brought its full price, and that just returns and accounts had been made of the proceeds. Not the slightest suspicion had ever entered the minds of any of them.

But William knew, or believed, at all events, that his brother, John S., as his trustee, had never given him his share, and he, accordingly, with the perseverance which belongs to truth, kept after him. John S. Hopkins died in May, 1883, and it was a great blow to William. He had hopes all through that John would make a will and leave him his share.

John S. had told William he would get his share when he, John, died (see pages 125 and 127, testimony). This was also sworn to by Mr. Charles H. Smith (see his testimony, page 184). And when John S. died without will, and left him nothing—his hopes were shattered—there was no longer anything on which this broken man could lean against. It was now suit or an abandonment of his rights.

Several lawyers were approached by William, but with no results, namely: Mr. Christy and Mr. John J. Johnson, page 522.

As stated by Mr. Johnson, in his testimony, Mr. Phillips was approached upon the subject—the case at that time supposed to be only the setting aside the conveyance of 7th July, 1860, by William to John S., as an absolute conveyance, and its declaration by a court of equity, as a trust, with an account. The frauds in the sales hereinbefore enumerated not being known or suggested by any one. As Mr. Samuel L. Phillips, from the moment of his consent to accept the case of William M. S. Hopkins, became the leading spirit, and to his efforts all the frauds have been disclosed. His testimony, as to their discovery is given at length in order that its truthfulness may be the subject of the severest scrutiny on the part of the court. It was with great reluctance, as shown by his testimony, that he went upon the stand as a witness, but inasmuch as it has become a rule in cases like these, where lapse of time has taken place, that the appellees must not only allege, but prove how the frauds complained of came to be discovered, and as he was the sole agent in their discovery it resulted in this, that Mr. Phillips had to be a witness, or the facts attending the discovery had to go unproved. In this dilemma there was no other course open but for him to ascend the witness-box. In doing so, however, he cordially and earnestly invited the severest cross-examination from the counsel for defendants. (See his testimony.) This offer was declined, and he was allowed to descend, with the implied recognition from them that his testimony was unassailable and truthful to the last degree (beginning at page 562). S. L. Phillips.

Q. Give a detailed and circumstantial account of your employment as an attorney in this case, and the discovery of the frauds alleged in this bill, down to the time of the interviews with the sisters of Wm. M. S. Hopkins?

A. My first knowledge of this case took place as follows: In the winter of 1884, I was boarding at the Metropolitan hotel in this city. One evening, as I was coming from my dinner, I was accosted in the lobby of the hotel by Wm. M. S. Hopkins, who said that he had an important case which he wanted to put in my hands. I asked him what the case was about, and he said it was to recover his share in his father's estate in some property in the northwestern section of the city. I said to him, "Have you any attorneys in the case?" He said yes; that he had employed Mr. Johnson and Mr. Christy, and he had not been able to get them to do anything for him, and he wanted me to take the case. I said: "You must excuse me; I cannot take your case; you have already two competent attorneys, and I decline even to listen to you on the subject." I left him, and about two or three weeks after that I met him again on the steps of the hotel. He again asked me if I could not take his case. I said, "I cannot even talk to you on the subject; it would be unprofessional. You must content yourself with your attorneys; they are competent, and I can have nothing to do with your case." Subsequently to that, I met Mr. Johnson standing at the corner of 4½ street and D street talking to Mr. Thomas, one of the attorneys in this case, and after the conversation between these two gentlemen was ended Mr. Johnson said to me that he wanted to get my services in the case of Hopkins, to recover his share of the property which belonged to him from his father's estate. I told him, very well, that I should be glad to assist him; that Hopkins had already spoken to me about it, but that I had refused to listen to any proposition. A few days after, Mr. Johnson came into my office with Wm. M. S. Hopkins, who said that he wanted to put the case in my hands, and bringing with him a copy of the original will of old John Hopkins. Mr. Johnson did not stay long that morning, but went over, as he said, to the court. I took the will, Hopkins remaining, and read it. I asked Mr. Hopkins what he knew in regard to the case? He stated to me the same story practically which he gave in his examination-in-chief in this case; that he had never received his share from his father's estate; that he had never received over $800 or $900, and that his brother John had refused to settle with him, having threatened to take him to the poor's house. I asked him if he knew anything further about the case; what witness he had; and he did not seem able to give me any information at all. After reading over the will, and thinking of the case until the next day, I determined that I would begin my investigations of it by an examination of the records. The next morning I went over to the record office, took the indexes, and began to look for the deeds from the Hopkinses, who were mentioned as either Wm. M. S. Hopkins, J. S. Hopkins, or George W. Hopkins, from the date of the will down towards the present time. The first that I discovered, which attracted my attention, was a deed from Wm. M. S. Hopkins and wife to John S. Hopkins, recorded in 1860. That recited a consideration of $3,000 as money in hand paid. Wm. M. S. Hopkins had not told me of this deed, and I was, I must say, considerably surprised to find that a conveyance had been made from him to his brother. The next conveyance that attracted my attention specially was one from Wm. M. S. Hopkins to Christopher Ingle, in trust, for the benefit of his wife, his children, and himself. This, also, he had not told me about. The next conveyance, which attracted my attention, was one from George W. Hopkins and John S. Hopkins, executors and trustees, to a man named Chapman. I next discovered a conveyance from Chapman to these two men, George W. Hopkins and John S. Hopkins, as individuals [981].

I continued my search for a few years longer down towards the present time, and found quite a large number of conveyances from these two trustees to different parties. There were so many that I did not come down to the present time. I returned to my office, and in a day or two afterwards Wm. M. S. Hopkins returned, or came in to see me. I asked him about this conveyance which he had made to his brother; whether he had sold the property to him, and he assured me—or he gave the same account of his brother getting him to make the conveyance that he gave in his examination-in-chief in this case. He further stated at that time that his wife had not signed the conveyance, but that he had been forced to do it by his brother. I asked Wm. M. S. Hopkins about the conveyance that he had made to Ingle as trustee, and he seemed to have forgotten about it, and it was sometime before he could recall the circumstance of it. I then asked if his brother had ever paid him the $3,000, stated in the conveyance from him to John S. Hopkins, the absolute conveyance in 1860, and he assured me that he had not; that all he had received from the estate was $800 or $900. I then said to him, "I must communicate with your wife, inasmuch as she will be a necessary party to this suit." He requested me to do so, and I subsequently did, which I shall detail in a moment. I asked him about these conveyances of John S. and George W. Hopkins to Chapman, and back again from Chapman to them, and he was able to give me no information about them, except that the property was held by John for his benefit, his share. I asked him who this man Chapman was. He said he knew a man by the name of Chapman, who was a bricklayer; knew him on the Board of Public Works, when he, Hopkins, himself, was connected with that Board. I said to Mr. Hopkins, "I must see this man Chapman; I want to talk with him." He said, "I will take you to him." I looked in the directory and got Mr. Chapman's number, and went there the next night with Mr. Hopkins. I was surprised to find Mr. Chapman, when I made myself acquainted with the gentleman, that it was not the gentleman in the deed. I asked him whether he had bought any property of John S. and George W. Hopkins, and he informed me that he had not, but that his brother had.

He stated that to me some six or seven years ago. On interrogating Mr. Chapman I found that he was not the gentleman in the deed, but that it was his brother, who was then dead. I asked John Chapman if the grantee in the deed was named James Chapman; what he knew about the sale to his brother James. He informed me that John S. Hopkins, some six or seven years ago, had come to him for the purpose of correcting a deed for part of this property, and in order to get him to do it, stated that his brother James had never owned the property, but that he had bought it in for the trustees. On the next day I communicated with Mrs. Sarah E. Hopkins, and she came over to Washington. I informed her that I had found a deed from her husband and from her to John S. Hopkins for $3,000 consideration. She informed me that she had never signed the deed, and gave the same account that she gave in her examination in this case. I also informed her that I had found a settlement to Christopher Ingle, in her favor, of her husband's share in this estate. She assured me that she had never heard of it before. I next told Mrs. Hopkins that I had discovered conveyances from these two men as trustees, to a man named James Chapman, and from James Chapman back to them, and that I had seen the brother of James Chapman, to whom John S. Hopkins had admitted that this was not a *bona fide* purchase on the part of James Chapman; and that if such were the facts, it was my opinion that the transaction was, to say the least, a constructive fraud, explaining to her what it was I meant by a constructive fraud. I told her that there was a large amount of property in the northwestern section of the city which had not been sold, and that William, her husband, was exceedingly anxious to bring suit to recover his share. She thereupon authorized me to bring suit for her.

My next effort at the discovery of testimony was to find out what were the terms of the sale which was made by John S. Hopkins and George W. Hopkins in May, 1864. After thinking the matter over, I determined that I would go to the *Star* office and search that paper for an advertisement of the sale. I went there, got them to give me the files of the paper for 1864, and in the first half of that year I found an advertisement of this property for sale, the sale to take place, I believe, on the 10th of May, 1864, which advertisement is filed as an exhibit in this case. In looking over the paper, from day to day, I saw that it was customary at that time for the *Star* to report the sales which had been made. After finding the last day when the property was advertised for sale, I searched the paper on the following days to see if there was any report of what had transpired at the sale on the previous day, and there I found that squares 95 and 96 had been sold for 4 cents a foot to James Chapman; square 111 had been sold at 9 cents a foot, I believe, to James Chapman, and some other lots in square 110 to James Chapman; but that all the sales which were made to other purchasers ranged at much higher figures, square 94 being sold to August Miller, at a price which would average, probably, 11½ cents a foot; to Mr. Gawler, also, at a much higher figure. I was then convinced more than I had been up to that time of the justice of the case. I determined to bring the suit on behalf of Mrs. Sarah E. Hopkins and Wm. M. S. Hopkins.

Q. Give a detailed and circumstantial account of the interviews with the sisters of Wm. M. S. Hopkins, and your employment by them as attorney, down to the time of the filing of this bill.

A. Wm. M. S. Hopkins came to see me again, and I wanted to know of him what his sisters knew about the case. He said he did not know, but that he would take me to see them. I went with Wm. M. S. Hopkins to see these ladies, etc. I went to see the ladies with Wm. M. S. Hopkins. I was introduced to Mrs. Wailes, Mrs. Hall, Mrs. Early, and Mrs. Lilburn. I stated to them that I had been employed by Mr. Wm. M. S. Hopkins, their brother, who was with me at the time, and his wife, Mrs. Sarah E. Hopkins, to bring a suit to set aside an absolute conveyance which had been made by Wm. M. S. Hopkins to John S. Hopkins in 1860, and also to obtain his share in his father's estate. I asked them what they knew (as that was the object of my visit) about this deed from William to John. They informed me that they knew nothing. That John was an exceedingly close-mouthed man, and he had never informed them anything in regard to it. I next told them that, in my investigations of the case, I had found a conveyance from these two men, as trustees, to one James Chapman, and back again from Chapman to themselves, as individuals; that I had discovered a witness, the brother of James Chapman, who had informed me that the sale was not a *bona fide* sale. I said that I had also searched the daily papers and had found that the property, wherever Chapman was the purchaser, was bought at a very low price, and wherever others were purchasers, strangers, it had brought what I considered to be a fair price. I stated to them that I wished to know what they knew about that sale and these purchases by Chapman. They informed me that they knew nothing. They gave, as nearly as I can remember, the same account that they gave in their examination in this case. I then stated to them that I believed the sale was fraudulent as to William's interest. Mrs. Hall, thereupon, spoke and said, "If this case has been a fraud upon William, why hasn't it been a fraud upon us?" I answered, that would depend upon whether they had received the benefits of the sale. They then, all of them, one speaking after the other, informed me that they had never received any money except what was paid shortly after the sale, and also a subsequent payment in 1873, from a sale of what they called the Mix lots. I said to the ladies: "How will you establish that you have received no other payments?" Mrs. Early said that she had her paper containing a statement of all she had received, and that she would like to submit it to me. I assented. She thereupon retired from the room, and in a few minutes returned with a paper containing a statement of the moneys paid to her by the trustees, George W. Hopkins and John S. Hopkins, which paper has been filed in this case as an exhibit with her evidence They assured me that that was all the money received by them, and then asked my opinion as to whether their rights did not stand in the same manner as did those of their brother, William. I said, that if the facts narrated to me were true, that they had no information of this sale until they were informed about it by me on that evening, and that all the money they had received was what was stated in these papers which have been filed as exhibits in this case, it was my opinion the cases were identical. Then suit was talked about being entered by them at the same time that the suit for William was to be instituted. They, the ladies, asked me if I would take their case. I said I would, as I believed from my knowledge of the land in question, the prices it had brought, and what they had told me, that they had not been fairly treated. I was then asked by one of them, I believe it was Mrs. Lilburn, what would I take their case for. I said there were two ways in which cases were accepted by counsel. One was by a retaining fee, the other was a contingent fee. They said they were unable to pay any money, as they were poor, but would pay a contingent fee if I would accept their case, and asked me what it would be. I said, after thinking, that I would be willing to take it for 25 per cent. on what was received, etc. They expressed themselves as perfectly satisfied with that arrangement. I thereupon said to them, "Ladies, you must understand that this suit will entail expense, the expenses and cost of the court will have to be borne by you." Mrs. Lilburn said, "How much will it cost?" I said to her, "I cannot say, because the case is yet undeveloped, and I cannot tell what the costs will be." She pressed me for an estimate. I said, "If it go no further than the court in the first instance, they may amount to $200 or $300, but it may be less; I will not bind myself to any amount. You are to understand that you are to pay these costs, or it would be illegal," using the word distinctly, "for counsel to pay costs." This was agreed to by all of them. I then interrogated them as to conversations that they or any of them had had with either George W. or John S. Hopkins in regard to their shares. They were able to tell me nothing of consequence, except that John was a very close-mouthed man, with the exception of Mrs. Lilburn. Mrs. Lilburn stated to me that she happened to be here at the time of the sale of the property, and on the same day, after the sale, she came down stairs and saw her uncle when he came in, and she asked him, "Well, Uncle George, has not the property brought very little," and he made her this answer: "No, the prices were fair and the sales were bona fide." I stated to her that that was very important evidence, and it was the only evidence they were able to furnish me as to the transaction. I said to them, "Ladies, I do not wish you to come to any determination about this suit until after you shall have thoroughly matured your views upon the subject." I said to them, "This is a very difficult case to gain." While it would be exceedingly easy if these transactions had happened one year or two years ago, it would be much more difficult to gain the case now, after this lapse of time, and more particularly after the death of George W. and John S. Hopkins, trustees; that the court would call for the strictest proof in regard to these frauds; and, therefore, it would be well to consider, before embarking into this lawsuit, just what obstacles they would have to meet; that such suits, where the parties were dead, and unable to appear and give an account, were generally decided against; and, therefore, they must not have anticipations of an easy victory. I urged them not to come to any conclusion that night. I said that I desired them to form their determination only after sleeping on the matter, or "taking a night on it," were my words, and in my absence, I said to them: "I feel it my duty, as you have consulted me, to say to you that the law requires you now to begin this suit promptly; that you have discovered these frauds—they have been told to you, or else you must abandon your claim forever." I said, after so long a quiescence, when parties are informed of the facts, it is their duty to act promptly, more so than if the transactions were of recent date. I left the ladies. They informed me, however, just before leaving, that there was another heir unrepresented, and asked me to call on Mr. William B. Hopkins, the son of George Washington Hopkins, and inform him that I was to meet them some two or three or four nights, or evenings, subsequently at their house. Etc.

Mr. Hopkins was not in, but came around in an hour or so to my office, where I narrated to him what I had discovered in regard to these frauds. Mr. Hopkins, thereupon, informed me that he, for one, if there was no one else to do so, would certainly enforce his rights. I also told him about the terms under which I was willing to take the case, and about the payment of the costs by the plaintiffs, and it was agreed to by him. At the appointed time, which was some two or three evenings afterwards, etc., I called again at the residence of Mr. Wailes to see these ladies according to appointment and at their request. After a few minutes Mrs. Hall spoke, and said: That she was poor, and that she had come to the conclusion that she would bring the suit on behalf of her interest. Mrs. Early was the next lady who spoke. She said that it was with great reluctance that she agreed to bring a suit against George W. Hopkins, her uncle's family; that she had lived a long time under his roof, and that she wanted to sue John S. Hopkins, her brother, alone. I said to her, in answer to that observation, that it was my opinion that could not be done, because the frauds complained of were those of the trustees jointly. I told her that the sale was made by John S. and George W. Hopkins jointly; that the purchase was made by them jointly, and whatever one had done, in my judgment, the other had done, and that I saw no reason to justify a distinction. She thereupon said she would join in the suit.

Mrs. Lilburn was the next one who spoke. She had more means than either of her sisters, Mrs. Early or Mrs. Hall, who, she said, were poor, and she would join them. Mrs. Wailes spoke next. She said that her husband had had business intercourse with John S. Hopkins, and she was desirous of keeping out of the suit. I said to her: "Very well, madam; if you do not care to come in as a plaintiff I shall make you a defendant." She said, "Can't I stay out?" I said, "That is the rule of chancery proceedings, and this is a chancery proceeding." I said, "When attacking a sale like this, the court will require that all persons interested shall be made parties." I said to her and to the others who heard me, "The court will not allow one heir or two heirs to try their hands, and when they are successful permit the others to come in and try their hands; but the court of chancery requires that all the parties in interest shall be represented in the suit, so that an end can be made of the litigation once for all." I said: "It is immaterial whether they be plaintiffs or defendants, they must be parties if they be interested." Mrs. Wailes thereupon said that she would join her brother and sisters in the suit. Wm. B. Hopkins, the son of George Washington Hopkins, expressed great eagerness to begin the suit. I said: "I do not want you to be deceived about the difficulties and magnitude of this case, or the enterprise you are to enter into, for I am determined that, if there be no success, I shall not be blamed with it, and therefore I have brought a decision of the Supreme Court of the United States, the last, I believe, on the subject, the case of *Lansdale* vs. *Smith*, 196 United States Reports." I read to them the rules of law that, in order to excuse long delay in the prosecution of a suit, it must be shown by the plaintiff that the delay was caused by some hinderance, impediment, or concealment of the party in possession. I think I read it over to them a half a dozen times, and tried to explain it to them. They instructed me to begin the suit, and I remember distinctly my last statement to them: "Ladies, if there be any surprise, I wish you to be surprised at gaining the suit instead of losing it."

The above is the uncontradicted statement of how these frauds were discovered and the suit came to be brought. No effort whatever was made to impeach one syllable of the above testimony; even cross-examination was waived.

A CASE OF GREAT LABOR.

For nearly three years, the solicitors of the appellees were engaged in unravelling the threads with which these trustees had woven their net. Many days, many nights, they sought to trace backward the footprints of these trustees. Time had made them faint in many cases. No doubt many footprints have been lost; no doubt not one half of the evidence of these frauds has been brought to light. As they read in the bill, read in the testimony, and are presented concretely in this argument, their discovery seems far more simple than they really were. It is one thing to look over a train of facts already discovered, and a far different task to begin, groping blindly in the dark, and make their discovery. It has taken the best efforts of two men, reasonably skilled in the law, with a fair knowledge of human nature, and acquainted with a business, to unearth these frauds and present them to the court.

Think you that these ladies could have accomplished this task, which has nearly foiled two lawyers, who were deeply in earnest? Think you that two of these unfortunately dissipated young men could have traced these frauds?

It required the previous training and industry that is possessed by a lawyer to have unravelled this case. No one but a lawyer could have done it.

These appellees do not to-day understand the merits of the case. They are almost as ignorant of their rights as they were at the beginning of these proceedings. When cross-examined by counsel for the appellants, upon the subject of their suit and their claim, they could scarcely give an intelligent account of the matter. The idea, then, that such appellees are to be held for negligence in not having discovered and traced out these frauds, secret frauds, as to which they even had no suspicion, would be not only a denial of justice, but a premium for fraud, and the higher the premium, the more cleverly concocted the fraud.

It is true the office of recorder of deeds was open, but what reason had these ladies to seek it? They were assured by the trustees that the property was sold for its full price; that the sale was fairly made under the most advantageous circumstances. Might they not have confidence in the truthfulness of their trustees? Does not the law say they may?

Suppose they had sought the recorder's office and found these deeds of Chapman. Do these deeds not conform to the knowledge they previously had that Chapman had bought at the sale, and subsequently the trustees had bought of him? Suppose they had sought the auctioneer, and had him turn to his account of sales. Would this account not have proved the same thing? They would have been baffled, if they had had the ability to understand the deeds?

How could these ladies trace these men through over one hundred deeds, tabulate them, compare them with the subdivisions of these squares and check them off as compared, so as to find out if their accounts were true? And that, too, when they were never informed that any account had been settled. How could these ladies search out witnesses who were acquainted with the value of this property, and the proper mode of sale?

If the court could only know the amount of work required and performed by these solicitors to ferret out these facts, it would dismiss any such proposition that the appellees could have unravelled this case as preposterous.

U. S. vs. *New Orleans R.*, 12 Wall., 365:

"Registry laws are intended for the protection of subsequent, not prior purchasers and creditors."

NOT A SPECULATIVE CASE.

On the occasion of several motions before the court the counsel for the defendants have been pleased to term this a speculative case.

It appears that this counsel is here resorting to a favorite sophistry, "when you have a bad case, try the counsel on the other side." This may do sometimes before a jury, but not before a court of equity, when the only evidence relied upon in proof of the case, is the open records of the surveyor's office, the recorded deeds of these trustees, the auctioneer's returns, their own letters, the testimony of disinterested and most respectable citizens, and the facts developed on cross-examination of the appellants' witnesses.

It is true that one of the solicitors for the plaintiffs in investigating the case of William M. S. Hopkins, discovered these frauds, and informed the appellees of their rights, when and after he was asked by Mrs. Alice C Hall; it is true that they, the appellees, employed said Johnson and Phillips to prosecute their rights, but only after the said Phillips refused to take any part in advising the desirability of the suit, refusing to allow them to be hasty in determining, refusing to be present at their consultation, and only after warning them of the difficulties, and cautioning them that if there was any surprise, let it be at gaining instead of losing their cause.

It is true that the appellees, being poor, entered into a contract with said solicitors for a contingent fee of 25 per cent., all the costs, however, to be paid and borne by the appellees.

It is true that said solicitors have pursued this case with all the ardor and skill in their power; but, it is submitted, with no more ardor and with not as much skill as the solicitors of the appellants have met them.

If this narration of facts, children suing for their birthright, who are too poor to pay adequate counsel fees in advance, and who are fortunate enough to enlist the sympathies and services of counsel upon a contingent fee, constitutes a speculative case, then this is one, and not otherwise.

But this case is not to be prejudiced in this manner. The court, after the foregoing array of facts proved mostly by contemporaneous written testimony, will not allow these representatives of these trustees to escape account and hold this ill-gotten property. These appellants stand in no better position than their ancestors. They are volunteers, pure and simple.

DEFENCE HAS BEEN ONE OF CONCEALMENT.

If time permitted, it could be shown that the deed of July 7th, 1860, admitted to be in the possession of John S. Hopkins, in 1873, by his letter, was not produced; that it was only on cross-examination that the true values of squares 131, 132, 133, 134, 112, and 97 were obtained; that the book of accounts of George W. and John S. Hopkins, trustees, were designedly cut, and a number of pages neatly extracted, their cut edges being yet fresh.

But the most damaging circumstances in this whole defence is the fact that although this is a suit for an account by trustees, and although it is proved by the testimony of the possessor of the book, said Bertha Hopkins, that said book does contain an account between the trustees and John Hopkins's estate, running through a large number of pages; yet these appellants did not produce the account. Not only did their ancestors conceal their frauds from the appellees, but these appellants are this moment concealing the truth from this court. Concealing their accounts, and at the same moment asking the court to dismiss the appellees' suit. What inconsistency? How different the course of honesty and fairness.

Bertha Hammond, sole heir of John S. Hopkins, appellant, page 989:

Q. Does this book contain the account of John Hopkins's estate, your grandfather?

A. I think it does.

Q. Do not you know it does?

A. I am almost certain. It has some account in which I saw the name of John Hopkins. I do not know whether it is a full account or not. I did not look over it to that extent to tell.

Q. It does contain the account?

A. It does contain an account headed "John Hopkins."

Q. Kept in whose handwriting?

A. Partly in my father's, and partly in my uncle's.

Q. Mostly in whose handwriting?

A. I could not say unless you let me see it.

Witness (examining book): It seems to be equally divided. I see as much of one as the other.

Q. Is it in anyone else's handwriting?

A. I do not see any other's except—

Q. (Interrupting). Except whose?

A. Except my father's and my uncle's, George W. Hopkins.

When men conceal, they have an object. When defendants in chancery, who are called to account, conceal, they have a strong motive. There must be something very bad lying underneath that would make them brave the animadversion of the court in so important a matter. What it is in this case we do not know. Possibly this account might show that these men appropriated thousands of dollars in running the brick business those five years—appropriated enough to pay the paltry price they gave for these squares, and that in fact, they never paid one dollar of their own money.

Callan vs. *Stratham*, 23 How., 480:

"But, independently of this consideration, there are other facts in the case that may well justify the decree below. The most important, perhaps, the unsatisfactory evidence on the part of Collins in respect to the payment of the consideration stated in the deed. This proof was valid, in order to uphold a deed in other respects surrounded with suspicion. The evidence was in their possession; and their admission that the transaction was secret made the proof still more indisputable on their part. The want of it, under the circumstances, is nearly, if not quite, fatal to the validity of the deed against creditors."

SALES BEING FRAUDULENT, TRUSTEES WILL NOT BE ALLOWED TO REAP ANY PROFIT.

These sales being fraudulent, the court of equity will not allow the trustees or their heirs to reap any advantage from their unholy scheme, but will set the sales aside *ab initio*, and hold them to an account for the profits which they have made. Doing equity, however, to them, which they refused to others, in allowing them credit for their lawful expenditures, as improvements, taxes, and payments to the appellees with interest thereon.

Oliver vs. *Piatt*, 3 How., 401;
Danbury vs. *Cockburn*, 1 Mer., 644;
Podmore vs. *Gunning*, 10 Cond. Eq., Ch. Rep., 219;
2 Ala., 603.

THE TRUSTEES DID NOT REPUDIATE FULLY THEIR TRUST UNTIL AFTER THE DEATH OF THEIR BROTHER, GEORGE WASHINGTON HOPKINS, THE LAST MALE RELATIVE.

At the sale of May the 10th, 1864, these trustees bought through said James Chapman subdivision lots 16, 17, 18, 19, 20, 21, 22, 38, and 39, in square 110. On the 20th of May following, they conveyed, with the others, squares 95 and 96, these lots to Chapman, and on the same day Chapman reconveyed them to the trustees as individuals—all being included in one deed. Thus the same title which they had for 95 and 96, they had for these lots.

Yet notwithstanding this title and the fact that they held them in their own name, as individuals, they conveyed as executors until after the death of both Isaac H. Hopkins, about 1866, and George Washington Hopkins, the father of Wm. B. Hopkins, and Anna, young infant at his death, on the 29th June, 1870, page 520.

They conveyed as follows:

On 26th July, 1865, lot 16, sq. 110, as executors, page 348.
On 3d June, 1867, lot 19, sq. 110, as executors, page 349.
On 16th Dec., 1870, lot 39, sq. 110, as individuals, page 350.

These men were exceedingly anxious not to awake investigation, particularly so, until time should honor their possession. Of the women they had no fear.

That these men fully understood the difference between individual ownership and trusteeship, is shown by nearly one hundred deeds signed by them. The deeds naming "George W. Hopkins, for himself, and George W. Hopkins and John S. Hopkins, trustees and executors of John Hopkins," and signed doubly in the same manner.

But Mr. Nicholas Callan, their conveyancer, and also the witness for defendants, on cross-examination, puts such knowledge on their part beyond doubt (page 604).

Q. Were not George W. and John S. Hopkins men of good business judgment?

A. None more so.

Q. They had been reasonably successful in life?

A. So I understand.

Q. Do you not think that they knew the difference between property that they owned as individuals and property that they held as executors and trustees?

A. I have no doubt of it at all.

Q. Men of good judgment?

A. Yes, sir; of course.

Q. I find a number of deeds executed by them as individuals and acknowledged before you as notary public. Have you any explanation to make why they did not use the caption of executors and trustees in those instances?

A. Not at all; none in the least.

Q. Do you remember what specific directions were given to you by them at the time you prepared the deed to Owen Thornton, Exhibit A. H., No. 1, which has been filed with your testimony?

A. They called to see me, these two gentlemen—

Q. (Interposing.) I am referring to this particular deed.

A. No, sir; I prepared this deed under the instructions of the gentlemen.

Q. But you do not remember what they told you at that time?

A. No, sir; not the slightest.

Q. This deed to Owen Thornton was prepared under their instructions?

A. Yes, sir.

Q. If they had told you that they had bought the property therein mentioned, and it had been conveyed to them as individuals, and that they claimed it as their own property, would you not have made the deed for them, and have them execute it as individuals?

A. Certainly.

Q. And not as executors and trustees?

A. Certainly. I certainly would, sir.

On the 4th March, 1871, they conveyed lot 17, sq. 110, as executors. This was the last as such; and on the 9th October, 1872, they began to convey regularly, as individuals.

This suit was filed on April 8th, 1884, consequently we have an open repudiation of the trust only from October 9th, 1872, to April 8th, 1884, of twelve years and six months. Far within any twenty years, or any statute of limitations.

RIGHTS OF WILLIAM B. HOPKINS AND ANNA B. HOPKINS.

George Washington Hopkins, one of the sons of old John Hopkins, died in 1870. At that time these trustees, as shown in the preceding paragraph, had not finally repudiated their trust, and were still conveying land bought by them in the name of Chapman, as trustees and executors. In 1870, before a final repudiation, George Washington Hopkins died, leaving the plaintiff, William B. Hopkins, a son, then eleven years of age, and Anna B. Hopkins, a daughter, then two years of age. William B. has only lately attained his majority, and Anna B. is still a minor. No laches can, therefore, be attributed to them.

NO BAR OF ANY STATUTE OF LIMITATIONS IN THIS CASE.

If this suit was at law, instead of being in equity, there would be no bar, for the subject matter being the enforcement of rights in land, the statute of James 1st applies, which limits such actions to twenty years, with a saving to infants and married women. The Maryland statute of limitations applies only to actions on promises, trespass, special actions on the case, and slander, &c.

The sale at which these trustees bought took place May 10th, 1864; the frauds were fortunately discovered in the early part of 1884, and the suit was filed April 8th, 1884, lacking, therefore, one month and two days of being twenty years.

The appellants are, therefore, precluded from setting up any absolute statutory bar in this case, claimed to be adopted in equity in analogy to the statute of limitations.

If these appellees are to be barred, it must be on the ground peculiar to equity—that of laches in the plaintiff.

But for laches to arise there must be knowledge of the facts complained of, or, which is the same thing, a negligence in using the means that persons placed in the same situation would ordinarily have used to discover them.

In passing upon this subject the chancellor will look at all the circumstances of the particular case. For as no two cases are alike in facts, each case must be judged of by its own attendant circumstances. The chancellor will put himself mentally in the situation of the parties, and ask if it was reasonable to expect more of such parties than was done. He will look at the fact whether the appellees be men or women. If men, what was their capacity to investigate, for what might be entirely excusable in women, and incompetent, unbusinesslike young men would be inexcusable in a smart, intelligent, active man (for example a lawyer). He will look at the relation sustained between the parties, and hold that where there exists blood ties, dependence and confidence, that the same degree of investigation is not required that is expected to be observed between persons standing at arm's length as vendor and vendee, or debtor and creditor. That such relationship naturally breeds trust and confidence, and in that confidence the weak and dependent may rely until their suspicions are aroused by some unequivocal knowledge; that this rule is doubly of force when to the ties of kindredship are added those of trusteeship. The chancellor will look also at the character of the persons complained against; whether they were shrewd, intelligent business men; whether they loved money; were aggressive; whether they had such strong wills and natures to overbear their weaker *cestuis que trust*, and whether they outwardly bore such good characters as of itself to allay suspicion. This great inequality will be a controlling and powerful aid in forming a correct judgment as to whether the *cestuis que trust* could have moved earlier or not. The chancellor will next examine the means by which the frauds were perpetrated—whether done secretly; with secret agents employed, and with secret means used to carry out to accomplishment the frauds. Such, we submit, in this case, as the employment of James Chapman to bid; the making of the conveyances in which were recited falsely the payment to Chapman; the secretion of the deeds from record until the last days allowed; the representations by the trustees to the plaintiffs that the property brought its full price (sworn to by Mrs. Eliza Dashiel and Mrs. E. E. Hopkins, witnesses for defendants); the entire absence of suspicion in the family; the belief, on the contrary, that all had been done honestly and fairly. The chancellor will then ask himself, as between women and incompetent young men, on the one hand, and designing men on the other—between children who looked up to their trustees as father and friend—if such persons should or ought to have doubted the integrity of these sales; and even if they should have doubted, how could they have unthreaded such a labyrinth, and proved to the court how the property should have been sold, and in what the frauds consisted—a thing it has taken the solicitors of the plaintiffs nearly three years to do, and that, they doubt not, very imperfectly?

Besides, it will occur to the mind of the chancellor that the defendants are setting up an inconsistent defense in this case. They are claiming with one breath that the appellees should have discovered these frauds sooner, and therefore guilty of laches, and at the next breath they say there are no frauds. If there are no frauds, how could the plaintiffs discover them earlier, or be charged with negligence? And if there are frauds, in fact, there can be no negligence, for the appellants at this moment are solemnly asserting there are none, have not only deceived the appellees, but are endeavoring to deceive the court. When men assert there are no frauds, their assertion, *ipso facto*, estop them, and relieves the opposite party from any charge of negligence or laches. The chancellor will also, in order to test the truthfulness of the ignorance of the appellees, look at the circumstances attending the discovery; and where it was naturally brought about, where it was such as the appellees themselves could not have fathomed, no negligence and no laches will be charged, and the fraudulent acts set aside.

In a word, the chancellor, as a reasonable and sensible man, will look at all the facts of the particular case, and in cases of trust, more especially, will not allow the incompetent the confidence, and the weak to be defrauded, and where there is the slightest doubt as to the entire integrity of the transactions, will set the same aside, not only to do justice between the parties, but as an example, on grounds of public policy. Fraud is hydra-headed, and the only tribunal in this land that holds a sword competent to behead it, is the court of equity.

Baily vs. *Glover*, 21 Wall., 347:

"In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstance or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. To hold that by concealing a fraud, or by committing a fraud in a manner that it conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure."

Affirmed in 111 U. S., 190. See also 11 Cl. and Fin., 714; 60 Me. 360; 5 Myl. and Cr., 179.

DISTINCTION BETWEEN CASES AGAINST BONA FIDE PURCHASERS AND THOSE AGAINST THE FRAUDULENT TRUSTEES AND THEIR HEIRS.

It will be observed a strong and well-marked difference in the line of reasoning is in all the cases where a bona fide purchaser is defendant, or where the guilty trustee or his children are defendants. No rights of bona fide purchasers are involved in this suit. In the former case every rule is stretched to preserve the rights of the innocent purchaser—the statute of limitations is applied with vigor, the doctrine of laches and notice given full force, every argument is adduced and applied to save the innocent; but this is not the case when the fraudulent trustee or his heirs are alone parties, as in this case. In this latter instance a more equal and unbiased rule prevails, and what would have been regarded as inexcusable negligence in the plaintiffs in the former case, is entirely overlooked in the latter, as the court is then only making the guilty, or those for whom the guilty labored, disgorge the unlawful gains.

Much confusion, however, has arisen, and apparent inconsistency of decision takes place, unless the reader of the opinions keeps well the relative character of the parties before his mind. And we venture to assert that no well-considered case can be found in which fraud has been charged against a trustee in buying at his own sale, and half the proof has been made, which has been adduced in this case, but what the sale, if under twenty years, has been set aside, if the trustee or his heirs are defendants.

Insurance Co. vs. *Eldredge*, 102 U. S., 548; and see also 4 *Bradwell* (Ills.), 473; 3 *Sumner*, 475–478; *Perry on Tr.*, 864, and notes.

"In a case where a deed of trust of lands to secure a promissory note was released by the trustee without the surrender of payment of the note or the express authority of the holder thereof, the court said that, 'as to the position that the complainant is barred of the relief he asks by laches in asserting his claim, we do not think there is any force in it.' * * * Nor can it aver that his claim to have the instrument cancelled, by which this priority was secured, is a stale one, when asserted within the period allowed by law, and no rights of third parties as bona fide purchasers have intervened to render inequitable the assertion of his original lien."

Case of *Badger* vs. *Badger*, 2 Wall., 87:

"Counsel for complainants have made a complete abstract of every case which has been decided by the Supreme Court of the United States, involving the subject of *laches* in its relation to relief in equity. The result of that examination has been that each case must be decided on its own circumstances. But there is one case, namely, Badger *vs.* Badger, from its meager and imperfect report, may be deemed so close in its circumstances to the present, that counsel have examined the printed record on file in the Law Library, Capitol. By an examination of this record it will be seen that the present case is essentially in all its important features different from that case.

"Badger, the ancestor, died in 1818, leaving a widow and ten children. One of them came of age 1824, another in 1828, a third in 1831, a fourth in 1834, a fifth in 1835, a sixth in 1837. The oldest son, Daniel B., and his uncle took out letters of administration in 1819, and in 1820 settled one administration account and asked leave to sell portions of the real estate to pay debts. To this account there was no objection.

"In 1827 they filed a further account, and which had indorsed upon it what purported to be the written approval of the widow and heirs, the latter acting by their guardians, and by this account they claimed credit for several thousand dollars paid creditors, and asked leave from the court to sell portions of the real estate to pay this balance due. Leave was granted, but at the instance of some of the heirs the sale was not made at the time. In 1830 they went into court again and had the order to sell renewed. One piece of property was sold on 20th July, 1830, and the balance, being by far the larger portion, was sold on 28th March, 1831. At this time three of the heirs had attained their majority. Public sale was made. One piece of the property, not very valuable, was bought by a man named Gillpatrick, and several pieces were bought by a man-named Hart. Subsequently, some two or three months afterwards, these two men conveyed to Daniel B. Badger, the administrator, what they had bought at the sale. The widow of old Badger died in 1855. On the 8th May, 1857, all the heirs then living, united in a bill, which they filed against Daniel B. Badger, their brother, and Joseph Badger, their uncle, charging that the account of administrators of 1827 was false and fraudulent, and that the sales were void because D. B. Badger had bought at his own sale through the agency of Gillpatrick and Hart. To this bill Daniel B. Badger and Joseph Badger, both answered fully, denying that there was any fraud in the administration accounts, and denying that Gillpatrick or Hart, or either of them, was the agent of Daniel B. Badger, but that they bought on their own account, and that it was only after the sale that Daniel B. opened negotiations with them for the purchase of the property. After these full and explicit answers were filed denying all fraud, the complainants dismissed their bill. Subsequently James Badger, one of the complainants, bought the interests of his brothers and sisters in the estate, paying from $150 to $180 for each interest, and after thus uniting in himself all the adverse interest, filed a bill in 1858 against the said Daniel B. Badger and Joseph Badger, charging the same frauds as contained in the previous bill. To this bill Joseph Badger, the uncle, answered, denying all personal knowledge of any frauds by himself, and on information and belief, all frauds by Daniel B. Badger, as to the purchase of said Daniel B. through Gillpatrick and Hart. Daniel B. died pending these proceedings, and before answer, and his son and heir, Erastus Badger, answered, denying all fraud. The only allegations in this bill as to why suit had not been instituted before, and the only excuse offered for the long delay of twenty-seven years was 'the fraudulent acts and doings of the said Daniel were unknown to the complainants and his co-heirs until within five years last past.'

"The answer of Joseph Badger, the sole surviving administrator, was (page 12, Record): 'As to whether the said Hart and the said Gillpatrick attended said sales respectively, and bid off said estates for the use and benefit of said Daniel B. Badger under a previous agreement or understanding with said Daniel B. Badger, the defendant has no knowledge, but to the best of this defendant's information and belief, each and every one of said allegations is untrue, and so this defendant denies the same.'

"On page 21 of the record in the answer of Erastus Badger, denying all fraud, and setting up the answer of David B. Badger in his lifetime (page 24), alleging distinctly and most positively that there was no agreement with Hart to buy for the administrator, but that Hart bought as an independent purchaser, and only afterwards did the administrator buy of him, and that he paid Hart an advance on all the purchase.

"On page 7 of the record it appears that the account of 17th Sept., 1827, which was charged to be false and fraudulent, was the subject of notice by the heirs who attended before the court, some objected, and it appears that the accounts were examined and approved at the time of the settlement by one of the two complainants, James Badger, an adult and brother, and by an adult sister and her husband, a commission merchant, and by the mother of all of them.

"To prove the issue on the part of the complainants, they introduced the various brothers and sisters and their husbands, and the court will observe that by their own admissions they not only knew all about the case in 1831, and the acts and doings of Daniel B., as administrator, but that in 1861, when they testified they knew nothing more than they did thirty years before. The court will also observe that these brothers and sisters did not live with the administrator, was not under his influence, but, on the contrary, believed, in 1831, and always afterwards, that Daniel B. was doing what was wrong by them.

"The first witness, Almira A. Badger, a sister, and who was, in 1831, fifty-three years of age, and therefore 23 years old at the time of the sale, says, at page 87 of the record, that the heirs were suspicious of Daniel B. And, again, at page 90, she says the family was always suspicious of the brother administrator, and always dissatisfied. She knew nothing in 1861, when she testified, that she did not always know.

"The next witness was another brother and heir, Augustus H. Badger, born in 1810; was a ship-chandler. At page 95 of the record he swore:

"That he talked plainly, if not quarrelled with Daniel in his management of the property. He knew nothing in 1861 that he did not always know before.

"The next witness was another brother and heir, aged 48 in July, 1861, a commission broker by occupation. At page 97 of the record, swears that he was suspicious, and believed that Daniel was not doing right. 'I was always on friendly terms with him, although I often told him he was doing wrong, and I thought he was cheating the minor children out of what belonged to them.' He testified to no newly-discovered evidence, and knew nothing in 1861 that he had not always known.

"Jacob Badger was the next witness, a brother and heir; was 57 years of age in July, 1861, which must have made him about 27 years of age at the time of the sale.

"On page 101 of the record, he swears that he opposed the sale by Daniel B. of the real estate, and that then Daniel B. bought him out. At pages 101 and 102 of the record he proves that he knew all about the circumstances of unfairness of the sale. He proves that all must have known who Hart and Gillpatrick were. He swears that he knew that Hart and Gillpatrick bought the property in for Daniel B., and that Daniel B. admitted the fact to him in 1831, a week after the sale.

"The next witness was Mary H. B. Sturgis, a sister and co-heir, age 45, in July, 1861. Swears, on page 109 of the record, that she had heard Daniel B. say often that he meant to have the whole of father's estate; that he was the eldest son, and it belonged to him. She acquiesced in his management. At page 112 she proves that she was not on friendly terms with Daniel B. She testified to no knowledge in 1861 that she had not always possessed.

"The next witness was Moses M. Smith, the husband of Eliza M. Smith, a sister and co-heir. He was a commission merchant. He swears, at page 128, record, that the widow said in 1833 that Daniel B. had done all he could to cheat her out of her property, as well as the children. He also proved that Daniel B. had once presented a paper to the widow to sign exonerating him, Daniel B., from all blame. The widow refused to sign, although Daniel B. offered to pay a note to her of $200 if she would. The next witness, Mrs. Eliza M. Smith, sister and co-heir, age 47, in 1861, at page 140 of the record, proves that her mother, at the time of the sales, complained in her presence and that of the family, of Daniel's abominable doings, and remonstrated with him as to his conduct as administrator. At page 141 it is shown that she knew of the alleged irregular and unjust sales of 1831. Thus it appears from the record, and this was all the testimony of the complainants on this subject, that the brothers and sisters and their mother knew all about the administration in 1831, and knew no further fact in 1858 than they then did. It was the constant source of discussion, complaint, hard feelings in the family, and yet they took no steps to right themselves.

"Gillpatrick was next offered as a witness, and he swore, at pages 152 and 153, that he bought at the instance and for Daniel B., the administrator.

"Hart was next witness, at pages 154 and 155, and he swears that he bought on his own account, and only afterwards sold to Daniel B.

"At page 187, Gillpatrick was contradicted by William Parker, who swore he was present at a conversation between Daniel Badger and Gillpatrick, at which interview he saw Daniel Badger pay Gillpatrick the money for the property he bought, and heard Gillpatrick then say that he could get more for the house, but as Daniel Badger said, it was the house he was born in, he should hold to his contract.

"Maud Wood, who lived in the family, at page 183, heard Daniel B. talking with Eliza, a sister, and James Badger, the complainant, several times, as if he, the said Daniel, owned the property.

"Quinn, a witness, was at the sale, page 193 of record, heard Daniel declare to the auctioneer that the estate was going too low, and he, Daniel, did everything to encourage the sale, and urged the auctioneer to dwell upon it.

"Jones, a witness, at page 200, record, was present at conversation in the family, when the conduct of Daniel, as administrator, was subject of discussion in the presence of old Mrs. Badger and the children; would accuse Daniel of having done something wrong, and the old lady would rebuke them, and say that she knew it was all right.

"Joseph Badger, uncle, and co-administrator, at page 212, swore that the sales were genuine and honest in all respects; that Daniel exerted himself to obtain the highest prices. The family knew at the time of the conveyance of Hart and Gillpatrick. The situation of the property was the constant subject of conversation in the family.

This was all the evidence offered, and shows no concealment by Daniel, and no wish or attempt to conceal, and no ignorance or misapprehension of the facts by the complainants, or any of the heirs. On the contrary, it is obvious that they were well informed of all the facts from the beginning. Although all were examined, not one testified to any concealment or ignorance.

"Hostility and distrust characterized their conduct, instead of confidence and reliance."

This cause was tried in the United States Court before Mr. Justice CLIFFORD, and is reported in 2 Clifford, 137.

He says, page 153: "A fraudulent design is charged by the complainant in respect to the employment of these persons," (Gillpatrick and Hart) "to bid on the real estate, but proof to that effect is wholly wanting in the record. On the contrary, the evidence shows, to the satisfaction of the court, that the sales were properly advertised, and in all other respects properly conducted, and that every reasonable exertion was made by the administrators to procure the attendance of bidders, and to obtain the best prices for the articles."

At page 154:

"Sales in this case, which the complainants seek to set aside, were made in 1830 and 1831, more than thirty years ago, and no reason or excuse is assigned for the delay. Present suit was instituted on the 6th September, 1858. Complainant, it is true, alleges that the fraudulent acts and doings of Daniel B. Badger were unknown to him, until within five years past, but the bill of complainant does not allege that the same were in any manner concealed from him, or when, or by what means the fraud was discovered."

Another answer, the court said, was that action for lands sold by executors and administrators could not be maintained by any heir or other person claiming under the decease, unless the same be commenced within five years next after the sale.

On this case, such as was made by the foregoing testimony, the court, in 2 Wallace, passed, and read in the light of the facts as related above, and can be verified by the official record on file in the Law Library of Congress, it is plain that the court could not have done otherwise than dismiss the brief for gross negligence.

PUBLIC POLICY.

On grounds of public policy, this sale should be set aside. If such a sale is allowed to stand and be reported in the law books, it will be a license to every dishonest trustee to defraud his *cestui que trust*, and no man can tell the evil effects it may work in the future.

Respectfully submitted,

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